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No. 15798 ✓

United States Court of Appeals
For the Ninth Circuit

CLYDE PHILP, *Appellant*,

vs.

SAM MACRI, PAULINE MACRI, JOSEPH MACRI, ELEANOR
MACRI, DON R. MACRI, KATHLEEN N. MACRI, HERMAN
HOWE and VIOLA B. HOWE, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

LYCETTE, DIAMOND & SYLVESTER
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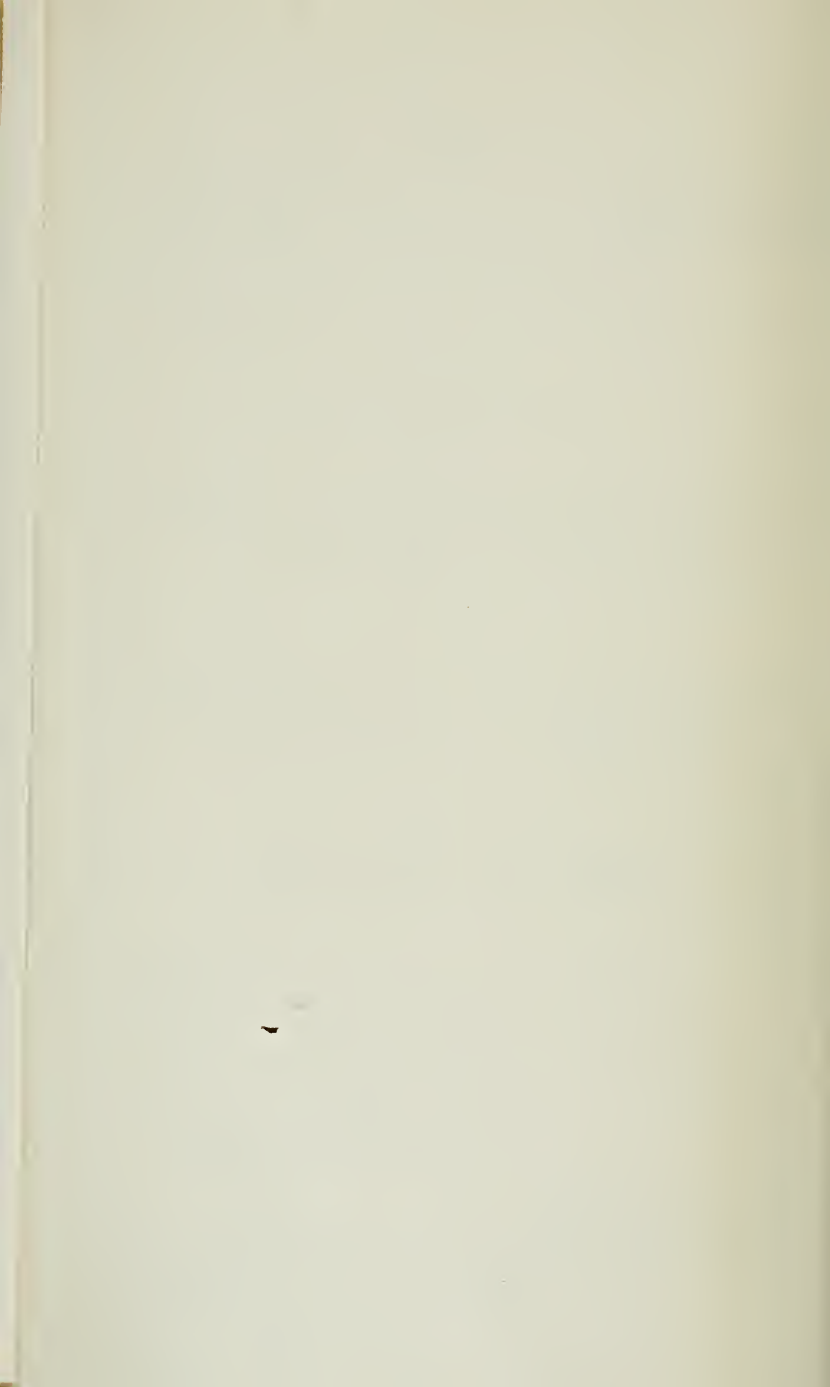
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United States Court of Appeals

For the Ninth Circuit

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MACRI, ELEANOR MACRI, DON R. MACRI,
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and VIOLA B. HOWE,

Appellees.

No. 15798

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

SUMMARY OF ARGUMENT FOR APPELLEES

1. The order dismissing plaintiff's complaint was proper and should be affirmed for the reason that the complaint violates Rule 8(a) (2) of the Federal Rules of Civil Procedure.

2. The order dismissing the first cause of action was proper and should be affirmed for the following reasons:

- (a) Appellant, being a resident of Peru, is not entitled to a decree enjoining legal proceedings against him in his own country.
- (b) Appellant seeks protection of a court of equity without offering to do equity.

- (c) Appellant can obtain any relief to which he may be entitled in the courts of Peru, which are courts of general jurisdiction.

3. The order dismissing the third cause of action was proper and should be affirmed, because it fails to state a claim upon which relief can be granted.

ARGUMENT FOR APPELLEES

1. THE COMPLAINT VIOLATES RULE 8 FEDERAL RULES OF CIVIL PROCEDURE.

The complaint in this case contains fifteen pages; and the first cause of action, alone, contains twenty-three numbered paragraphs. It is replete with argument, conclusions, and extraneous matter, and clearly violates the rule requiring pleadings to contain a short and plain statement of the pleader's claim in simple, concise and direct averments.

In *McCann vs. Clark*, 191 F. (2d) 476 (1951) (certiorari denied, 72 S. Ct. 112; 342 U.S. 872; 96 L. Ed. 656)., the court said:

"The pleading in the case before us does not contain a short and plain statement of the claim, and its averments are neither simple, concise nor direct. It is so flagrantly violating of Rule 8 that it should have been dismissed on that ground, if on no other."

In *Condol vs. Baltimore and O. R. Co.*, 199 F. (2d) 400 (1952), it was said:

"The District Court would have been justified in dismissing the complaint for failure to comply with subsections (a) and (e) (1), of Rule 8 of the Federal Rules of Civil Procedure, which re-

quires a pleading to contain a short and plain statement of the pleader's claim in simple, concise and direct averments."

While the District Court did not base the dismissal of the complaint in this case upon the fact that it violated Rule 8, Federal Rules of Civil Procedure, it did point out that the complaint was violative of that rule (Tr. 33), and that it required "careful study for elimination of conclusion of law and other extraneous matter." Even if the grounds upon which the complaint was dismissed were not sustainable, the order dismissing the action should nevertheless be affirmed. As stated in 3 *Am. Jur., Appeal and Error*, § 1008.

"A decision right in result will not be reversed even though the reason for it is wrong."

and in § 1163 of the same authority:

"A judgment below will be affirmed, even though based upon a ground insufficient to warrant it, if another ground exists which is sufficient, for it is the general rule that a decision of a trial court which is correct as a matter of law will be affirmed, even though the trial court arrived at its conclusions by an erroneous process of reasoning. A judgment will be affirmed if, in point of law, it should be affirmed."

The same rule is stated in 5 *C.J.S., Appeal and Error*, § 1849, as follows:

"Where there is any ground upon which the action of the lower court may be sustained, the judgment may be affirmed, although the ground or reason assigned for the action of the court may not be sustainable."

2. ORDER DISMISSING FIRST CAUSE OF ACTION WAS PROPER.

(a) APPELLANT IS NOT ENTITLED TO DECREE ENJOINING LEGAL PROCEEDINGS AGAINST HIM IN PERU.

In his first cause of action, the appellant seeks a decree of the United States District Court enjoining the appellees from proceeding in the courts of Peru to enforce certain judgments obtained against him.

The complaint of the appellant alleges that he is a resident of Lima, Peru, and seeks to restrain the appellees from proceeding with the suit they have instituted against him in Peru, on the ground that no accounting has been made between the parties in connection with certain contracts or joint ventures in which they were formerly engaged.

It seems apparent that, in view of the fact that the suit against appellant has been brought in Peru, the country of his residence, and the only jurisdiction where process could be served upon him or in which judgments against him could be rendered effective, the granting of an injunction against the maintaining of legal proceedings in Peru would be to effectually prevent the appellees from obtaining any relief whatever.

Many jurisdictions, even when sufficient grounds for an injunction actually exist, will not grant an injunction against maintaining legal proceedings in an-

other state unless the parties both reside in the state where the injunction is sought. *American Exp. Co. vs. Fox*, 135 Tenn. 489, 187 S.W. 1117, Ann. Cas. 1918B 1148; *Folkes vs. Central of Georgia R. Co.*, 202 Ala. 376, 80 S. 458; *Hartford Accident & Indemnity Co. v. Bernblum*, 122 Conn. 583, 191 A. 542. In the latter case, in discussing the rights of courts of one state to enjoin the prosecution of an action in another, the court said:

“One of the most usual grounds for such action is the fact that the party enjoined has sought by resort to the courts of another jurisdiction to deprive a *fellow citizen* of some benefit which should rightfully be accorded him under the law of the state of their *common residence* . . .

“In other words, underlying the cases in which relief by injunction has been granted is the fact that the proper forum for the determination of the rights and liabilities of the parties is *the state of their common residence*.” (Italics ours.)

The foregoing quotation from the *Hartford* case is set out in *Wehrane vs. Peyton*, 134 Conn. 486, 58 A. (2d) 698, 6 A.L.R. (2d) 887, in which the court said:

“Implied in these statements and inherent in the ground upon which such relief is granted is a limitation, ordinarily applicable, that *courts will act only to protect one who is domiciled in the state where the injunction is sought*.” (Italics ours.)

Even if it be conceded that, in a proper case, a resident of a foreign state might be granted an injunction, the power of the court to grant such an

injunction "should be exercised sparingly, and only where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice." 43 *C.J.S., Injunctions*, § 49. In 28 *Am. Jur., Injunctions*, § 207, it is said:

"The question as to when a court of equity will exercise jurisdiction to restrain parties from prosecuting proceedings in other states is one of great delicacy, owing to the fact that it may frequently lead to a conflict of jurisdiction. On general principles, and on grounds of comity, the power is sparingly and reluctantly exercised, and the relief is not granted except for grave reasons and under very special circumstances."

If a resident of a foreign country could succeed in obtaining from the courts of this country an injunction against the bringing and maintaining of legal proceedings against him in the country where he resides, on the ground that he claimed to have a defense to the action, residents of the United States would be almost powerless to enforce their rights against absconding debtors or other persons who had removed from this country. They would first have to institute legal proceedings in the foreign country, at great disadvantage and considerable expense, because jurisdiction of the non-resident could be obtained in no other way. Then, if an injunction were granted by the courts of the United States against the maintenance of the suit in a foreign country until such time as an accounting as to the profits or losses from partnerships or joint ventures between the parties had been ob-

tained, the residents of the United States, at considerable additional disadvantage and expense, would be compelled to resort to the courts of the foreign country to obtain a decree settling the accounts between the parties, because jurisdiction of the non-resident could be obtained in no other way. And even if the courts of the United States, in some way, could obtain jurisdiction and enter a decree settling the accounts, it would still be necessary for the residents of this country to bring proceedings in the courts of the foreign country to try to enforce the judgment entered by the courts of the United States, for they would have no other way of obtaining jurisdiction over any property or property rights of the non-resident.

In the brief of appellant, pages 11 to 14, inclusive, appellant points out that the complaint merely alleges that an action against him was commenced in the Supreme Court of Peru, and that there is no allegation as to the course of the action or as to the status of the pleadings in Peru. The statement contained in the memorandum decision (Tr. 33) to the effect that plaintiff has actively appeared in and thus far unsuccessfully contested the Peruvian lawsuit was based upon a statement contained in the memorandum of authorities submitted by the appellees and quoted on page 12 of the brief of appellant, and upon oral statements made to the court at the time of the argument of the motion to dismiss. However, the present

status of the legal proceedings in Peru is entirely immaterial, and it is not important whether they have been pending for some time or whether they have only recently been commenced. The important thing is that the Peruvian courts have jurisdiction of the parties and of the litigation pending in Peru, and that jurisdiction should not be interfered with under the circumstances by the courts of this country.

(b) APPELLANT SEEKS PROTECTION OF COURT OF EQUITY WITHOUT OFFERING TO DO EQUITY.

The appellant in this case seeks equitable relief, without offering to do equity. His sole purpose is to prevent the appellees from carrying on the suit which they have instituted in the only country where the appellant could be found, and while he alleges that there has been no accounting made by the defendants in connection with contracts between the parties, he does not seek an accounting in this action, nor offer to secure the payment in this jurisdiction of such an amount as an accounting might show that he owes to the appellees. His sole and only prayer is that the court restrain the appellees from proceeding with the suit against him in the jurisdiction of his domicile.

It is true that, at page 5 of the brief of appellant, he states that he "submits himself to the equitable jurisdiction of the court for all purposes, including a declaration, if warranted, of liability in such amount as the court might find." However, he makes no offer to

secure the payment of such amount as the court might find, and does not even offer to pay such amount as the court may find to be owing.

As we have pointed out, it would be necessary for the appellees to resort to the courts of Peru to attempt to enforce any judgment that the court may make in this action, and as a condition precedent to obtaining equitable relief, the appellant, at the very least, should offer to give security to guarantee that the decision and judgment of the court will be complied with by him.

(c) ANY RELIEF TO WHICH APPELLANT MAY BE ENTITLED CAN BE OBTAINED BY HIM IN THE COURTS OF PERU.

The courts of Peru are courts of general jurisdiction. The appellees have invoked the jurisdiction of the Peruvian courts, for the reason that that is the only way in which they could obtain any relief against appellant; and, as the court, in the case at bar, stated in his memorandum decision and order (Tr. 33):

“Due to voluntary residence in Peru, as alleged in the complaint, plaintiff is subject to the jurisdiction of the courts of that country.”

We have not overlooked the fact that the complaint of the plaintiff (Tr. 10) *alleges* that in the courts of Peru, appellant cannot show that the judgment sued upon is owned by a partner and joint venturer and arises out of a joint venture or partnership in which there has been no accounting. This allegation

of the complaint is a pure conclusion of law, and no facts are alleged to substantiate it. As is stated in 31 *C.J.S., Evidence*, § 21:

“The courts do not take judicial notice of either the written or unwritten laws of a foreign country.”

In 20 *Am. Jur., Evidence*, § 46, the rule is stated as follows:

“A court takes judicial notice only of the law prevailing in its jurisdiction; judicial notice will not be taken of foreign laws, whether written or unwritten, except to the extent that our courts take judicial notice of the common law of England. Foreign laws will not be noticed by either the state or federal courts unless pleaded and proved.”

The Uniform Judicial Notice of Foreign Laws Act, which was adopted by the State of Washington in 1941, expressly provides:

“The law of any jurisdiction other than a state, territory or other jurisdiction of the United States shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.” (R.C.W. 5.24.050)

The appellant, having established his residence in Peru, and having compelled the appellees to resort to the courts of that country in order to obtain any redress against him, cannot complain that the appellees have proceeded to do so. They are at a much greater disadvantage than he is, and any relief to which he is entitled could be obtain by him in the courts of his own country.

3. THE THIRD CAUSE OF ACTION DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In the third cause of action set out in the complaint of appellant (Tr. 19, 20), he alleges that the defendants have slandered him by circulating in financial circles in Lima, Peru, "the erroneous story that defendants would sue and did sue plaintiff because he did not pay his share of a joint venture and partnership." The complaint carefully avoids the naming of any persons to whom communications were alleged to be made, the contents of any such alleged communications, or the persons who are alleged to have made such communications. It is so indefinite that neither the court nor the defendants could possibly ascertain from it when, by whom, or to whom the alleged communications were made, or what the alleged communications consisted of.

In 53 *C.J.S., Libel and Slander*, § 164, at page 255, it is said:

"As a general rule, the complaint must set out the particular defamatory words as published, . . . and a statement of their substance and effect or meaning is generally held insufficient."

and in 33 *Am. Jur., Libel and Slander*, § 237, the rule is stated as follows:

"The complaint or other pleading must contain allegations sufficient to show that the statement or matter complained of is defamatory as to the plaintiff. While some courts have held that libel or slander complained of may be set out in sub-

stance and effect, the great weight of authority supports the view that in the absence of any statutory provision to the contrary, it must be reproduced verbatim, not only in order to enable the court to determine whether it is in fact defamatory, but also to apprise the defendant of the exact charge that he will be called upon to answer."

The allegations of the first and second causes of action have been made a part of the appellant's third cause of action, by reference, even though the second cause of action has been dismissed, and no assignment of error with respect to the dismissal thereof is made by the appellant (Tr. 5). It seems apparent, therefore, that the only communications the appellant relies upon as having been made by the appellees consist of the statements made in the pleadings and other documents relative to the suit brought by the appellees in the Peruvian courts against appellant. If this be so, the statements made by appellees in connection with the suits are absolutely privileged, and form no basis for a cause of action for slander against them.

In 53 *C.J.S., Libel and Slander*, § 104d (1), at page 104, it is said:

"Defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged; and it is immaterial that the allegations are false and malicious or are made recklessly and without probable cause and under cover and pretense of a wrongful or groundless suit. This rule is based on sound public policy, and is adopted because it would be a discourage-

ment to litigants, and defeat justice, if they were to be subjected to prosecutions for allegations in pleadings filed therein."

It is well established by the decisions of the Supreme Court of the State of Washington, that all charges and allegations contained in pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient or not, are absolutely privileged. *Abbott vs. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376; *McClure vs. Stretch*, 20 Wn. (2d) 460, 147 P. (2d) 935; *Miller vs. Gust*, 71 Wash. 139, 127 Pac. 845; *Johnston vs. Schlarb*, 7 Wn. (2d) 528, 110 P. (2d) 190, 134 A.L.R. 474.

It seems clear that the third cause of action set out in appellant's complaint, which contains nothing except general and indefinite statements and conclusions, fails to state any cause of action upon which relief can be granted, and that the order of the District Court in dismissing it should be affirmed.

Respectfully submitted,

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than \$3,000.00. The complaint alleges that the plaintiff is a resident of Lima, Peru (Tr. 3); that the individual defendants, the Macris and the Howes, live within the jurisdiction of the District Court (Tr. 4), and that the defendant Continental Casualty Company is an Indiana corporation doing business within the jurisdiction of the District Court (Tr. 4). The matter in controversy in the first cause of action exceeds \$87,000.00 (Tr. 14, 15). The matter in controversy in the third cause of action is \$100,000.00 (Tr. 20). Thus jurisdiction in the District Court exists under 28 U.S.C. 1332.

Jurisdiction of this Honorable Court rests on 28 U.S.C. 1291 and 28 U.S.C. 1294.

STATEMENT OF THE CASE

Since this appeal is based upon the dismissal of appellant's complaint for insufficiency, the facts of the case must be limited to those set forth in the pleadings.

I. First Cause of Action

The first cause of action asks for injunctive relief to prevent the fraudulent enforcement of a judgment by the appellees in Lima, Peru, where the appellant is engaged in the contracting business. The complaint alleges that the appellant had, in 1944, engaged in a joint venture with various of the appellees, which consisted of the performance of a sub-contract to do work appurtenant to the construction of the Roza Dam in the State of Washington (Tr. 5). Continental Casualty Company was the surety on the performance bond furnished by the joint venturers (Tr. 6). The principal sum of the bond was \$84,833.75. The joint venture was terminated later in the year, a written memorandum setting forth the terms of the termination having been executed between the joint venturers (Tr. 23). By the terms of this agreement, the appellant was obligated to pay the appellees 52 $\frac{1}{3}$ % of the loss, if any, on the construction contract and the appellees agreed to perform the work thereunder as expeditiously as possible and as required by the contract obligations. The termination agreement further provided that the arrangement therein made should be accomplished in a spirit of co-operation and friendship (Tr. 26, 27).

The appellees did not carry out the construction work in an expeditious manner, but unreasonably and without cause, carelessly delayed in finishing the work,

causing excessive cost and expense (Tr. 7). This was in violation of the termination agreement. Thereupon, suit was instituted in the name of the United States of America for the use of certain sub-contractors against the appellant, the appellees and the surety, Continental Casualty Company. The appellees in the same action cross-complained over against the appellant for losses which they had purportedly suffered on the job (Tr. 8). The appellant in response to the cross-complaint asked for an accounting (Tr. 7, 8). Judgment was entered against the appellant and the appellees in favor of the bonding company, Continental Casualty Company, in the sum of \$87,828.81, plus interest and attorneys' fees; the action of the use plaintiffs against the appellant was dismissed, and the cross-complaint of the appellees against the appellant was dismissed for the reason that the appellees failed and refused to give the required accounting (Tr. 4, 7, 8).

After receiving its judgment, Continental Casualty Company, by means of attachment, garnishment and execution recovered some \$17,000.00 which was due the joint venturers (Tr. 9). Thereafter, the appellees made a settlement with Continental Casualty Company. However, instead of requiring any satisfaction of the judgments, the judgment of the bonding company was assigned to the appellee Herman Howe. Howe actually has not had and does not have a real interest in the judgment but merely holds the same as agent for the appellees Macri for their use and benefit (Tr. 9).

While the appellant is referred to in this summary as having engaged as an individual in a joint venture

with the appellees Macri, in fact, appellant and one Goerig doing business as a partnership were engaged in the joint venture with the appellees Macri. The judgment of Continental Casualty Company was against Goerig and appellant. The appellee Howe actually had sued Goerig on this judgment in Idaho but that suit was settled by Goerig paying Howe \$2,250.00 in return for which Howe dismissed the suit and delivered to Goerig a full release executed by the appellees Macri (Tr. 12, 13).

The appellee Howe thereafter, for the use and benefit of the appellees Macri, brought an action in the country of Peru in order to enforce the collection of the Continental Casualty Company judgment against the appellant (Tr. 10). In the United States, the appellant would have various defenses to the enforcement of the judgment by appellees. Such defenses, centering on the requirement that one partner to sue another partner, must first render an accounting, are not available to him in Peru (Tr. 10, 11). The appellees thus are conspiring to defraud the appellant by making him pay 100% of the loss of the joint venture despite an agreement to the contrary (Tr. 14). Whatever the bonding company may have paid out on the judgments against it, the appellees Macri in fact sustained no loss and actually realized a profit on the job and they have failed and refused to provide an accounting to the appellant (Tr. 13). Not only are the appellees attempting to collect the full amount of the judgment which arises out of transactions wherein they were joint venturers and co-partners with the appellant, but they are at the

same time attempting to retain profits out of the same joint venture, all of which would produce a most inequitable result (Tr. 15). Based upon the foregoing facts, the appellant prays that he have an order restraining the appellees from bringing or prosecuting against him any action arising out of the assignment of the judgment on behalf of Continental Casualty Company to the appellee Howe pending an accounting in which further liability, if any, can be determined by a court of proper jurisdiction. In this respect the appellant submits himself to the equitable jurisdiction of the court for all purposes, including a declaration, if warranted, of liability in such amount as the court might find.

II. Second Cause of Action

Appellant makes no specification of error with respect to dismissal of his second cause of action.

III. Third Cause of Action

This is in substance a cause of action for slander. The appellant alleges the facts set forth in his first cause of action and in addition thereto the following: Appellees circulated in financial circles in Lima, Peru, the false story that they were going to sue the appellant because he did not pay his share of a joint venture, although they knew that appellant was being asked to pay more than 100% of the alleged losses and that his liability could not exceed $52\frac{1}{3}\%$ of any such loss (Tr. 18, 19). They contacted various citizens of Peru and advised them that the appellant was heavily indebted to them, thereby giving an incomplete, damaging and derogatory view of the appellant's financial

condition (Tr. 18). As a result of this slanderous conduct, the appellant was damaged in the sum of \$100,000.00.

IV. Action Of Trial Court

The appellees moved against the respective causes of action set forth in the complaint for the reason that they each failed to state a claim upon which relief could be granted and for the further reason that the complaint had failed to set out a short and plain statement of the claim as required by Rule 8 (a) (2) of the Federal Rules of Civil Procedure (Tr. 29, 30, 32).

The District Court dismissed the three causes of action, finding that the complaint was to some extent violative of Rule 8 (a) (2) of the Federal Rules of Civil Procedure and subject to dismissal under Rule 12 (b) (6) of the Rules for the reason that the respective causes of action and all of them failed to state a claim upon which relief could be granted. As stated before, no error is specified as to the dismissal of the second cause of action, and therefore there is no discussion of the Court's ruling thereon. With respect to the first cause of action, the reason for the Court's dismissal thereof seems to have been that the appellant had subjected himself to the jurisdiction of Peru and that having unsuccessfully contested the lawsuit there, his application for a restrainer of the appellees would not be heard (Tr. 33). With respect to the third cause of action, the District Court seems to have considered this cause of action as one for malicious prosecution, as it did the second cause of action, and dismissed the third cause of action without any discussion or recognition that it involved slander (Tr. 34).

V. Issues

It is the position of the appellant that the following issues are raised by the facts as set forth in the foregoing pleadings:

1. Is this Court open to the plea of a resident in a foreign jurisdiction for equitable relief?
2. May the Court restrain a person subject to its own jurisdiction from prosecuting an action in another jurisdiction, given the proper grounds for doing so in its own jurisdiction?
3. Does the attempt by a partner or a joint venturer to enforce the payment of a judgment by another partner or joint venturer for 100% of the loss of the joint venture, without first rendering an accounting, provide a proper basis for injunctive relief?
4. Were sufficient facts pleaded in the third cause of action to provide the basis for a slander action?

SPECIFICATIONS OF ERROR

The District Court erred in the following particulars:

1. In considering the complaint as being violative, presumably for prolixity, of Rule 8 (a) (2) of the Rules of Civil Procedure.
2. In basing dismissal of the first cause of action on matter outside the pleadings, that is, the statement in appellees' Memorandum of Authorities as to the status of the proceedings in Peru.
3. In basing dismissal of the first cause of action upon the ground that the appellant was subject to the jurisdiction of the courts of Peru.

4. In failing to hold that the first cause of action stated sufficient facts upon which injunctive and equitable relief could be granted.

5. In failing to consider the nature of the third cause of action and in holding that there were insufficient facts pleaded therein to constitute a cause of action for slander.

ARGUMENT

I. The Complaint Is Not Offensively Prolix

The subject matter of this action involves ramifications which are widely spread as to time, parties and substance. Certainly, with hindsight, one can point to the complaint and suggest additions, alterations and deletions. But the test, as with most human effort, is sufficiency and not perfection. This is the spirit and ruling of the cases which have considered motions of this character. This Court in *United States v. Hyde, et al.* (1906) 145 Fed. 393, 394, stated :

“Absolute perfection in pleadings is not often obtained and there may be some averments in the bill that might perhaps have been more clearly stated, and some sentences might with propriety have been left out, but this character of criticism could be urged in all cases. Courts should deal with the substance, not the mere form of language used in a pleading.”

The tenor of this ruling was applied recently in *Sunbeam Corp. v. Payless Drug Stores* (N.D. Cal., 1953) 113 F. Supp. 31, which consisted of a complaint of thirty-four legal size pages, plus thirty-five pages of exhibits. The Court refused to strike.

See also Moore's Federal Practice, Second Edition,

Volume 2, page 2312, *et seq*, Section 12.21, especially at page 2317, and also Section 8.13 at page 1652, where there is cited with approval the view of Judge St.Sure in *Securities Exchange Commission v. Timetrust Inc.* (N. D. Cal. 1939) 28 F. Supp. 34, 1 Fed. Rules Ser. 8 a .25 Case 4:

“Perfection in pleading is rare. There may be allegations in the complaint which might properly have been left out, but this kind of criticism could be urged in all cases. Prolixity is a besetting sin of most pleaders. Courts should deal with the substance and not the form of the language of the pleadings. Where no harm will result from immaterial matter not affecting the substance, courts should hesitate to disturb a pleading. Another consideration, in such circumstances, is that to grant the motion would delay bringing the case to a speedy trial.”

II. The Facts Stated in the Complaint and Their Reasonable Intendments Must Be Taken as True

The determinative facts in this case are those set forth in the complaint, together with the reasonable inferences to be draw therefrom. In *Radovich v. National Football League* (1957) 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. (2d) 456, Reh. den. (1957) 353 U.S. 931, 77 S. Ct. 716, 1 L. Ed. (2d) 724, the Court stated at page 448:

“Since the complaint was dismissed, its allegations must be taken by us as true.”

At page 453, the Court stated:

“Likewise we find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in *Hart v. B. F.*

Keith Vaudeville Exchange, 262 U.S. 271, 274, 43 S. Ct. 540, 541, 67 L. Ed. 977 (1923) is whether 'the claim is wholly frivolous.' "

In the case of *Lada v. Wilkie* (CCA 8, December 18, 1957) 25 Fed. Rules Serv. 12 b .34 Case 1; 250 F.(2d) 211, the District Court had dismissed the complaint on the grounds that it had failed to state a claim upon which relief could be granted. The court in its opinion summarized the allegations of the complaint which set forth that the plaintiffs were residents and citizens of Germany and heirs at law of the deceased; that the defendants in effect fraudulently induced the plaintiffs to accept \$20,000.00 for their interest in the estate which consisted of oil lands. The relief prayed for was that the conveyances made by the plaintiffs to the defendants be set aside, that the probate proceeding be vacated, that they receive the rents under the oil lease paid to the defendants and for certain other relief. The Court stated as follows:

"The plaintiff's complaint is not a clear, concise and definite statement of their claim. As the District Court ruled, part of the relief which they demanded the Court could not possibly grant. The question, however, was not whether all of the relief asked for by the plaintiffs could be granted, but whether, under any state of facts which might be established at a trial in support of the claim stated in the complaint, they could be accorded any relief.

"Assuming, as we must, for the purposes of this case, that the facts stated in the complaint are true, we think that the District Court would not be powerless to do anything toward righting such

wrongs as those of which the plaintiffs complain. If, as might be inferred from the facts alleged in plaintiff's complaint, viewed in the light most favorable to them, the defendants . . . bore to them a relation of trust and confidence, acquired in the way of gains, profits or property out of the estate . . . exceeding in amount or value the \$20,000.00 which had been paid to the plaintiffs for the estate, would have to be accounted for by those defendants and would in equity belong to the plaintiffs under the principles upon which this court relied in (citing cases) and which are applicable generally to those who take advantage of a fiduciary relationship to acquire the property of others to whom they owe a duty of fidelity.

“The plaintiffs' claim, may at a trial on the merits, prove to be groundless, but as was said by Mr. Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 ‘lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.’ The order appealed from is reversed and the case is remanded with directions to reinstate the plaintiffs' complaint and to try the case on the merits.”

III. On a Motion to Dismiss, Matter Outside the Pleadings Should Not Be Considered

With respect to the foreign action, appellant's complaint sets forth no more than that the appellees brought an action against him in the Supreme Court of Peru (Tr. 10). There is no allegation as to the course of the action or as to the status of the pleadings in Peru. The District Court, however, states that the appellant actively appeared and unsuccessfully contested

the Peruvian lawsuit (Tr. 33). It seems clear that the District Court considered that such action on appellant's part estopped him from seeking relief. The District Court's ruling would make it appear that the appellant had voluntarily submitted himself to the jurisdiction of the Peruvian court and applied for relief to this Court only when it developed that his choice as to forum and procedure was poor. As stated before, there is no allegation whatsoever in the complaint on which such a finding can be based and indeed, the facts alleged in the complaint actually state, to the contrary, that the appellant was involuntarily drawn into the Peruvian court. The only area in this entire proceeding which provides a basis for the District Court's statement is the following language in the appellees' Memorandum of Authorities submitted to the District Court which, on page 2, line 20 thereof, states:

“Plaintiff herein seeks equitable relief, without offering to do equity. His sole purpose is to prevent the defendants from carrying on the suit which they had instituted in the only country where the plaintiff could be found. The suit so instituted has been pending for many months and is now in the appellate courts of Peru and defendants respectfully submit that the jurisdiction of the Peruvian courts should not be interfered with by the courts of this country.”

It is true that Rule 12 (b) of the Federal Rules of Civil Procedure provides:

“If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and

not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

It is evident that none of the requirements of Rule 56 were complied with or even considered in this matter. No notice was given as required by the Rule nor were there any depositions, admissions, affidavits or any matter other than the Memoranda of Authorities presented to the Court for its consideration. A case aptly in point is that of *Sardo v. McGrath* (CCA, D. C. 1952) 196 F.(2d)20. This was a suit by an alien against the Attorney General for a declaratory judgment relative to a prior deportation hearing. The defendant moved to dismiss and an order was entered dismissing the complaint with prejudice. The government argued that while the District Court inadvertantly phrased its order in terms of dismissal of the complaint, what was really intended was the entry of a summary judgment. In support of this proposition, it was argued that the trial court, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, could treat a motion to dismiss for failure to state a claim as a motion for summary judgment, if matters outside the pleadings were properly presented. The statements outside the record were the statements of fact contained in their memorandum of points and authorities filed in the District Court. The Court stated as follows:

“Whether or not a summary of this kind, drawn up by an attorney and included in his memoran-

dum of points and authorities, can qualify as 'matters presented' within 12 (b) depends on our view upon whether it is the sort of material contemplated by Rule 56. The latter is the definitive rule concerning summary judgment; Rule 12 (b) merely provides one means of arriving at that end. It does not enlarge the record on which a summary judgment may be granted under Rule 56. (The court then sets forth the pertinent language of Rule 56 (c)). Thus, the extra-pleading matters presented must be either 'depositions,' 'admissions' or 'affidavits.' All three possess certain characteristics which make them fitting instruments for cutting through a possible maze of false, illusory or collateral issues raised by loosely drawn pleadings. As the sworn statement of those who have first hand knowledge of that about which they speak, they partake not only of the ceremonial quality of testimony in open court, but also of some of the guarantees of trustworthiness which characterize such testimony.

"In marked contrast, memoranda of points and authorities are no more than trial briefs which must be filed with each motion presented to the District Court. They must state 'the specific points of law and authorities to support the motion' and are expressly not made part of the record . . . Neither the Federal Rules nor custom at the bar contemplate transformation of legal memoranda into a new vehicle of actual conflict. Certainly, attorneys do not ordinarily conceive that they proceed at their peril if they fail to controvert allegations of fact made by opposing attorneys in their briefs. To accept appellee's view would be to introduce a confusing system of collateral pleading which could only detract from the relative simplicity of present summary judgment practice."

IV. The District Court Has the Capacity to Restrain a Person Subject to Its Jurisdiction from Acting in a Foreign Jurisdiction

In a proper instance, courts can enjoin a person subject to its own jurisdiction from doing an act in a foreign jurisdiction. See *Conflict of Laws* by Joseph H. Beale (1935) Volume 1, page 415, Section 96.1, wherein it is stated:

“If, however, the court is only asked to forbid the defendant who is within the state from doing an act abroad, there can be no objection to a decree; since the defendant, being within the state, may remain there and abide by the terms of the decree. He is not compelled to act elsewhere in violation of the rights of any other state. The defendant, in other words, may legally be enjoined from acting anywhere. The principle is illustrated by the important case of *Philadelphia Company v. Stimson* [223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912)]. The Secretary of War had made regulations concerning the use of riparian land which interfered with the use plaintiff desired to make of his own riparian land. Plaintiff, claiming that the regulations were invalid, filed a bill in the District of Columbia to restrain the Secretary from enforcing the regulations. The land was outside the District. The Court held nevertheless that it had the right to issue the injunction. This is the ground upon which it is held that a court may restrain a party within its territory from bringing suit abroad, though the power is used only in a very strong case.”

In the cited case of *Philadelphia Company v. Stimson*, suit was brought in the courts of the District of Columbia by a Pennsylvania corporation. The subject matter of

the suit was the reclamation and occupation of certain lands by the Philadelphia Company in the harbor area of Pittsburgh, Pennsylvania. The defendant demurred, including among his grounds the plea that the Supreme Court of the District of Columbia had no jurisdiction to define boundaries in Pennsylvania or to remove a cloud upon title in that state. The Supreme Court of the United States stated that having jurisdiction of the person of the defendant and therefore being able to compel obedience to its decree, there was no reason why the Courts of the District of Columbia could not consider the equities involved and, on this jurisdictional basis, it proceeded to give the Pennsylvania corporation relief against the Secretary of War who resided in the District of Columbia by enjoining him from acting in the State of Pennsylvania.

See also Handbook on the Conflict of Laws, Third Edition, Herbert F. Goodrich (1949), Section 68, which states as follows:

“There is abundant precedent for enjoining a defendant, personally before the court, from doing acts abroad. He may be ordered not to trespass on foreign land, not to commit torts of any other nature *and may be enjoined from prosecuting foreign lawsuits.*” (Emphasis supplied).

The American Law Institute Restatement, Conflict of Laws, Section 96, states as follows:

“In the exercise of their discretion courts frequently forbid individuals subject to their jurisdiction to perform acts in another state. Since such a decree can be carried out without disturbing the physical status quo in another state and since the

defendant may ordinarily obey the injunction by remaining in the state which issued the decree, such orders are not uncommon. Whether a decree of this character will be rendered depends upon the principles of equity jurisdiction as understood and developed by the courts of the forum and is no part of the Restatement of this Subject. It may be stated, however, that when acts are threatened which subject the plaintiff to irreparable damage or when the balance of convenience and fairness require, such a decree will be readily issued.”

The facts in the instant case should appeal strongly to the equity and conscience of the Court. There is also the matter of convenience and assistance to the Court and the parties in the development of the facts. The entire factual background of this matter is within this jurisdiction and not thousands of miles away. To establish appellant’s defenses in Peru, considering the great barriers of distance and language, would be a most formidable task, assuming that it were in any degree possible to do so, although appellant has pleaded as a fact that the possibility does not exist. This element of convenience was considered in *Northern Pacific Railway Company v. Richey & Gilbert Company* (1925) 132 Wash. 526, 232 Pac. 355, which held that an injunction was properly granted whereby the prosecution of a suit in Minnesota by a Washington corporation on a cause of action arising in Washington against a Wisconsin railroad corporation, whose principal place of business was in Minnesota, was properly granted. See also *Donaldson v. Greenwood*, 40 Wn.(2d) 238, 242 P. (2d) 1038 (1952) and *Steele v. Bulova Watch Company*, 334 U.S. 280, 73 S. Ct. 252, 97 L. Ed. 319 (1952).

V. The Appellees Are Attempting to Do in a Foreign Court That Which the Law Would Not Allow Either in the Courts of the State of Washington or in Any United States District Court

Under neither the common law nor the law of the State of Washington could appellees Macri recover upon the judgment which they seek to enforce against appellant in Peru. This judgment resulted directly from transactions of the partnership composed of appellees and appellant (Tr. 5, 6, 7, 8, 9). It is settled beyond question that no action at law can be brought on such transactions until there has been an accounting of the partnership. The Supreme Court of Washington, in its most recent decision on the subject, *Stipcich v. Marinovich*, 13 Wn.(2d) 155, 124 P.(2d) 215, stated at page 163:

“Respondent was a partner of appellant and as such was unable to maintain the present action for the reason that, until an accounting and settlement of the partnership affairs is had, there is no cause of action between partners arising out of the partnership transactions except an equitable action for an accounting. *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 Pac. 824; *Potter v. Scheffsky*, 139 Wash. 238, 246 Pac. 576; *Pollock v. Ralston*, 5 Wn.(2d) 36, 104 P.(2d) 934.”

In the *Pollock* case, last cited in the above quotation, the partnership association, as in the instant case, had terminated prior to the commencement of the action, but no accounting had yet been made. The Washington Supreme Court, in holding that the plaintiff was not entitled to a jury trial of the issues there involved,

quoted the rule from *Stevens v. Baker*, 1 Wash. Terr. 315:

“ ‘The rule is almost universal that one partner cannot sue his co-partner at law, without alleging and proving a settlement of the partnership indebtedness, the accounting together of the partners and the ascertaining of a balance and a promise, either express or implied, to pay that balance.’ ”

The court then quoted from 47 C. J. 805, Sec. 252:

“ ‘As a partnership continues after its dissolution for the purpose of collecting its claims, paying its debts, and adjusting its affairs, an action at law cannot be brought by one partner against another for money alleged to be due him on account of partnership transactions, until after a settlement, even though the partnership has been dissolved.’ ”

A great many cases have been gathered in the series of comprehensive annotations appearing in 21 A.L.R. 21, 58 A.L.R. 621 and 168 A.L.R. 1088, cited to the general rule, as set out on page 1091 of the latter annotation:

“It is the universally accepted rule that, in the absence of statutory permission, or express promise, or fraud, an action *ex contractu* at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership transactions, unless there has been accounting or settlement of the partnership affairs.”

Appellees' action, through their assignee, to compel appellant to pay the full amount of the judgment, with interest and costs, as alleged in the complaint (Tr. 14), when appellees had settled with the partner-

ship creditor for a much smaller sum (Tr. 12), is clearly prejudicial, oppressive, inequitable and fraudulent. The payments made by appellees Macri on the judgment were simply items to be included in the partnership accounting. Whether by taking them into account appellant owes anything to appellees Macri, or whether, as appellant alleges (Tr. 13) there were sufficient profits from the partnership to offset the payments, must be determined before any recovery can be had from appellant. Yet these matters cannot and will not be gone into in the Peruvian action (Tr. 10) and appellant will be deprived of his right as a partner to the protection afforded under the laws of the jurisdiction where the relationship existed and where the obligations and rights of the parties arose.

Such conduct on the part of appellees is clearly in violation of the statutory and common law mandate that they must account as a fiduciary to appellant as their partner. The uniform partnership act states the rule thus:

“Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.” Rev. Code of Wash. 25.04.210 (1).

As applied to joint ventures, the Washington court, in the case of *Donaldson v. Greenwood*, 40 Wn.(2d) 238, 242 P.(2d) 1038, has quoted the following with approval from the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1:

“Joint adventureres, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.”

Instead of displaying such loyalty, these appellees seek in their action in Peru to enforce the payment of the judgment to their own profit and benefit far beyond anything they could possibly be entitled to in an accounting. At most, in any accounting of the partnership, appellees could take credit for only the amount they paid upon the judgment, yet they have pursued it at its face value (Tr. 14), with neither credit nor offer of credit for the benefit obtained in their settlement with the partnership creditor.

VI. The Facts Pleaded Sufficiently State a Cause of Action for Slander

Despite the use of the term itself, the District Court ignored the action for slander. The third cause of action incorporates and realleges all of the matter set forth in the two causes of action pleaded prior thereto. The substance of these facts is that the appellees caused to be circulated in financial circles in Lima, Peru, where the appellant was engaged in the construction business, a false story relating to his solvency and financial integrity; they circulated reports that he did not pay his

share of a joint venture arrangement knowing this to be false and they contacted various residents of Peru advising such residents that the appellant was heavily indebted to appellees and giving an incomplete and derogatory view of the appellant in his capacity as a businessman; that the appellant's business reputation was thereby damaged to the extent of \$100,000.00. These statements, which must be taken as statements of fact, certainly are reasonably calculated to show that the appellant was seriously exposed to damage and loss in his business or profession. Such remarks are slanderous *per se*. Prosser on Torts, Second Edition (1955), at page 590, cites the case of *Harman v. Delany* (1731) 2 Strange 898, 93 Eng. Rep. 925, which stated:

“The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person.”

The reasonable intendment of the language set forth in the complaint is that the appellees commented falsely on the appellant's business reputation in a manner reasonably calculated to instill doubt, hesitation and reluctance on the part of any prospective creditor in Lima, Peru. All businessmen depend upon credit, and if possible, this is even more the case where a contractor is involved. He must have credit in extraordinarily large sums as evidenced by the entire pleadings in this action. Since this matter was before the District Court on a motion to dismiss, it was not a question of the language expressly setting forth defamatory statements, but rather that the matter set forth in the pleading be

reasonably susceptible of defamatory meaning. See *Meyerson v. Hurlbut* (1938) 68 App. D. C. 360, 98 F.(2d) 232, 118 A.L.R. 313.

CONCLUSION

The pleadings essentially set forth facts which were intended to appeal to the conscience and equitable jurisdiction of the court. The facts in essence are that the appellees, desiring to evade the requirement and responsibility of making an accounting to the appellant, struck upon the device of obtaining for their use and benefit the very foundation of the partnership liability, that is, the judgment held by Continental Casualty Company. Hiding behind a false front, the appellees have forwarded the judgment to a jurisdiction where the true state of affairs cannot be shown. They are attempting to collect all that the bonding company lost and even more since the bonding company received some amount of payment on its judgment. The fact that the bonding company made any payments as a result of which the judgment was granted, by no means compels a conclusion that the appellees did not profit on the job. The judgment on behalf of the bonding company means no more than that the latter was required to pay bills that were not paid by the appellees. This has no necessary relationship with the amount of money the appellees may have received on the job nor with the actual profits made by the appellees. Therefore, appellees are in South America with a judgment regular on its face attempting to collect the same in full despite their specific promise under their agreement and their duty under the law to furnish an accounting to and strike a

balance with appellant, whereby appellant would be obligated to pay no more than $52\frac{1}{3}\%$ of the loss, if any. This is conduct of a most fraudulent and oppressive kind. Courts have enjoined conduct of a far less inequitable and oppressive nature. Appellant should be granted his day in court for the presentation of evidence in proof of his first and third causes of action.

Respectfully submitted,

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No. 15798

United States
Court of Appeals
for the Ninth Circuit

CLYDE PHILP,

Appellant,

vs.

SAM MACRI, PAULINE MACRI, JOSEPH
MACRI, ELEANOR MACRI, DON R.
MACRI KATHLEEN N. MACRI, HERMAN
HOWE and VIOLA B. HOWE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
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FILED

MAR 12 1958

PAUL P. O'BRIEN; CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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Attorneys for Defendants Macri and
Howe.

In the United States District Court for the
District of Western Washington

No. 4334

CLYDE PHILP,

Plaintiff,

vs.

SAM MACRI and PAULINE MACRI, Husband
and Wife; JOSEPH MACRI and ELEANOR
MACRI, Husband and Wife; DON R. MACRI
and KATHLEEN N. MACRI, Husband and
Wife; CONTINENTAL CASUALTY COM-
PANY, a Corporation, and HERMAN HOWE
and VIOLA B. HOWE, Husband and Wife,

Defendants.

COMPLAINT

Comes now the plaintiff and by way of first cause
of action against the defendants, and each of them,
complains and alleges as follows:

I.

That the plaintiff is a resident of Lima, Peru.

II.

That the defendants Sam Macri and Pauline
Macri are husband and wife; Joseph Macri and
Eleanor Macri are husband and wife; Don R. Macri
and Kathleen N. Macri are husband and wife, and
Herman Howe and Viola B. Howe are likewise hus-
band and wife.

III.

That all of the individual defendants herein are residents of Seattle, King County, Washington, and live within the jurisdiction of the United States District Court, for the Western District of Washington.

IV.

That the defendant Continental Casualty Company, is a corporation organized under the laws of the State of Indiana, is doing business in this state, and doing business within the jurisdiction of this court.

V.

That on or about May 1, 1947, in Civil Actions Nos. 246, 250, 251, 255, 257 and 267 in the District Court of the United States for the Eastern District of Washington, Southern Division, judgments were entered in favor of the United States of America for the use and benefit of the following use plaintiffs: M. C. Schaefer, H. H. Walker, Inc., J. W. Morrison Company, Union Concrete Pipe Co., Inc., a Washington corporation; Yakima Cement Products Company, a corporation; and Walton Lumber Company, a corporation, in the total sum of \$87,828.81, plus interest, carrying attorney's fees therefor in the sum of \$2,825.00 and costs against the Defendants Sam Macri, Joseph Macri and Don R. Macri, copartners, and Continental Casualty Company, a corporation. The action of use plaintiffs against this plaintiff and A. J. Goerig was dismissed without costs, but judgment in various sums was given

to Defendant Continental Casualty Company against Sam Macri, Don Macri and Joe Macri, this plaintiff and A. J. Goerig, copartners and joint venturers, with attorneys' fees.

VI.

Plaintiff alleges that prior to the 11th day of December, 1943, said Sam Macri, Joe Macri and Don Macri were copartners engaged in the construction business, and that at the same time said A. J. Goerig and this plaintiff were also copartners engaged in such construction business, and that on said date said partnerships entered into a certain written agreement under which said partnerships agreed, among other things, to engage in certain construction projects as joint venturers under the name and style of Macri & Company, and that on or about May 18, 1944, as one of the joint ventures so agreed to be undertaken by said partnership, said parties, under such name of Macri & Company entered into contracts with the United States of America, through the Department of the Interior, known as Specifications No. 1062 and No. 1068 of the Roza Division of the Yakima Project, Washington, wherein and whereby said partnerships contracted to furnish materials and perform work in accordance with the requirements of said contracts; that on said 18th day of May, 1944, to secure faithful performances of said contracts and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of said project, said partnerships, as Macri & Company, as principal, and Continental Casualty

Company, as surety, made, executed and delivered to the United States of America, as obligee, a performance bond or undertaking in the principal sum of \$84,833.75, conditioned, among other things, that if said principal should promptly make payment to all persons furnishing labor and materials for said project, said bond would be void, otherwise to remain in full force and effect; that thereafter, and on the 15th day of July, 1944, said partnerships, and the individual members thereof, entered into a certain written agreement terminating certain of the joint ventures entered into pursuant to said Joint Venture Agreement of December 11, 1943, under which agreement of termination it was agreed, among other things, that said Sam Macri, Joe Macri and Don Macri, as copartners as Macri & Company, should take over and complete and perform such contracts covering specifications No. 1062 and No. 1068 as expeditiously as possible and as required by the contract obligations, and that in the event the said Sam Macri, Joe Macri and Don Macri should sustain any financial loss in respect to the performance of said contracts, then when said loss was ascertained and determined, said Clyde Philp and A. J. Goerig should pay to said Sam Macri, Joe Macri and Don Macri fifty-two and one-third ($52\frac{1}{3}$) per cent of such loss, if any; that a true copy of said agreement of termination of said joint ventures is hereto attached, marked Exhibit A, and by reference made a part of this complaint to the same effect as though fully set forth herein.

VII.

Plaintiff alleges that thereafter said Sam Macri, Joe Macri and Don Macri, as such copartners, did take over the performance of said contracts, but that in the performance of the work thereof, they failed and neglected to carry on the work expeditiously and in a workmanlike manner, but permitted the same to be delayed without reasonable cause and great cost and expense, and performed large portions of said work in a careless manner, and not in accordance with the requirements of said contracts, requiring any replacements of such work at great cost and expense and failed and neglected to pay for labor and materials furnished by others to whom they had subcontracted portions of the work, and particularly in that they failed and neglected to pay the amounts to the above-named use plaintiffs for labor and materials furnished for said project, and by reason thereof, said Civil Actions Nos. 255 et al., as listed above were instituted in said District Court of the United States for the Eastern District of Washington, Southern Division, in the name of the United States of America for the use and benefit of said use plaintiffs against Sam Macri, Joe Macri, Don Macri, A. J. Goerig and this plaintiff, and Continental Casualty Company, resulting in the judgments and judgments over described in paragraph V of this complaint.

VIII.

In these actions instituted by the use plaintiffs, A. J. Goering and this plaintiff demanded an ac-

counting from Sam Macri, Don Macri and Joe Macri, copartners and joint venturers. This the Plaintiffs Macri refused or neglected to furnish and as a result the court dismissed the cross-complaint which the Defendants Macri had instituted against A. J. Goerig and this plaintiff as copartners and joint venturers and gave the use plaintiffs judgment against Sam Macri, Joe Macri and Don Macri and Continental Casualty Company, but dismissed the use action against A. J. Goerig and this plaintiff. However, the court gave judgment over in favor of Continental Casualty Company against Sam Macri, Don Macri, Joe Macri, Clyde Philp (this plaintiff) and A. J. Goerig, copartners and joint venturers doing business as Macri & Company.

IX.

Plaintiff alleges that thereafter said Continental Casualty Company settled and discharged said judgments in favor of the United States of America for the benefit of the use plaintiffs in said actions, as above described, and thereby became entitled, as subrogee, to enforce its said judgments over in said action against said Sam Macri, Joe Macri, Don Macri, A. J. Goerig and this plaintiff, and that thereafter, on divers dates unknown to this plaintiff, said Continental Casualty Company, by attachment, garnishment, execution and other legal proceedings, recovered of this plaintiff, A. J. Goerig, Sam Macri, Joe Macri and Don Macri divers sums of money on its said judgments over and

upon certain other judgments over, hereinafter described, in partial satisfaction thereof, the total amount so recovered by said Continental Casualty Company being unknown to this plaintiff, but which is known to the defendants herein and said Sam Macri, Joe Macri and Don Macri, and which this plaintiff is informed and believes and alleges amounted to at least \$17,480.28, but that this plaintiff has no information as to which of said judgments over said amounts were applied, and further alleges that said judgments over in said Civil Actions have been partially satisfied by the amount of said payments properly applicable thereto, and that thereafter, at a date unknown to this plaintiff, said Sam Macri, Joe Macri and Don Macri settled and discharged all remaining liability to said Continental Casualty Company under said judgments over, by the payment of certain amounts of money thereon, the amount so paid unknown to this plaintiff, but that in lieu and instead of having said judgments satisfied and discharged of record, caused said judgments to be assigned to the Defendant Herman Howe herein, for the purpose of having said Defendant Howe attempt to collect said judgments and attorneys' fees in full from this plaintiff without any credit for the use and benefit of said Sam Macri, Joe Macri and Don Macri, and plaintiff further alleges that the Defendant Howe herein has no interest in said judgments, and the collection thereof, except as an agent of said Sam Macri, Joe Macri and Don Macri.

X.

That the Defendant Herman Howe, acting for and on behalf of the Defendants Sam Macri, Don Macri and Joe Macri, caused or induced the Defendant Continental Casualty Company to assign to him the judgments taken by Defendant Continental Casualty Company in the United States District Court for the District of Washington, Eastern Division, against Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, copartners and joint venturers, for which assignment the Defendant Herman Howe paid no consideration, (the small consideration being advanced by Defendants Sam Macri, Don Macri and Joe Macri).

XI.

That thereupon the Defendant Herman Howe, acting for and on behalf of his principals, Sam Macri, Don Macri and Joe Macri, brought an action against the plaintiff in the Supreme Court of the country of Peru in order to enforce the collection of such judgments mentioned above from this plaintiff.

XII.

That in the Supreme Court of the nation of Peru one resisting a judgment transferred there cannot show that, as in this instance, the judgment sued upon is actually owned by a partner and joint venturer and arose out of a joint venture or partnership in which there has been no accounting.

XIII.

That the said Sam Macri, Joe Macri and Don Macri are the real parties in interest, and are proper, necessary and indispensable parties to this action.

XIV.

Plaintiff alleges that under the terms and conditions of said agreement terminating said joint venture, this plaintiff and A. J. Goerig are jointly but conditionally liable to said Sam Macri, Joe Macri and Don Macri only to the extent of fifty-two and one-third ($52\frac{1}{3}$) per cent of any loss sustained by said Sam Macri, Joe Macri and Don Macri in the performance of said contracts covering specifications No. 1062 and No. 1068, when such loss, if any, is ascertained and determined, provided that the performance of said contracts by said Sam Macri, Joe Macri and Don Macri was performed in a proper and workmanlike manner as expeditiously as possible, and as required by their contractual obligations; that although duly demanded by this plaintiff and said A. J. Goerig, said Sam Macri, Joe Macri and Don Macri have failed, neglected and refused to furnish any accounting of their receipts and disbursements on said contracts, and by reason thereof, the profit or loss thereon, if any there be, has not been determined or ascertained, and by reason thereof their action on the judgments is prematurely brought.

XV.

That the Defendant Herman Howe, acting for and on behalf of the Defendants Sam Macri, Joe

Macri and Don Macri, brought an action in the United States District Court in Idaho for the Eastern Division, being entitled Herman Howe, Plaintiff, vs. A. J. Goerig, Defendant, cause No. 1772, which file is made part of these pleadings as though fully set forth herein and incorporated herein by reference.

XVI.

That in this action before the United States District Court of Idaho Herman Howe, the defendant in the present action and the plaintiff in Idaho, although acting for and on behalf of the joint venturers, defendants herein, Sam Macri, Don Macri and Joe Macri, set forth the judgments resulting from the joint adventure between Sam Macri, Don Macri and Joe Macri and A. J. Goerig and this plaintiff; set forth the payment of these judgments by the Defendant Continental Casualty Company and the assignment of these judgments and attorneys' fees by Defendant Continental Casualty Company to the Defendant Herman Howe, in which assignment the Defendant Continental Casualty Company attempted to limit its liability for making the assignment as part of the conspiracy referred to herein later.

XVII.

That the action in Idaho, above referred to, was settled by the defendant therein, A. J. Goerig, by his paying to the plaintiff therein, Herman Howe (a defendant herein), the sum of \$2,250.00 as a result of which an order was entered in such court dismissing the action, and in accordance therewith

a release in full signed by the defendants in this action, Sam Macri, Don Macri and Joe Macri and Herman Howe, was delivered to A. J. Goerig who had been a joint venturer with the Defendants Sam Macri, Don Macri and Joe Macri and this plaintiff.

XVIII.

That plaintiff is informed, and therefore alleges, that the said Sam Macri, Joe Macri and Don Macri sustained no loss whatsoever on said contracts covering Specifications No. 1062 and No. 1068, and actually realized a profit thereof, as will appear upon a true and correct accounting of said contracts being had, and further alleges that if the said Sam Macri, Joe Macri and Don Macri did sustain any loss on said contracts, the same was due and caused by the negligence and carelessness of said Sam Macri, Joe Macri and Don Macri in the performance thereof, by allowing the work to be unduly delayed without cause, improper workmanship and otherwise failing to meet the contractual obligations required under said contract.

XIX.

Plaintiff requested of Defendants Sam Macri, Joe Macri and Don Macri and Herman Howe and Continental Casualty Company, and of each of them, that he or it satisfy the judgments referred to herein.

XX.

These Defendants Sam Macri, Joe Macri and Don Macri, by and through their agent, Defendant

Herman Howe, are attempting to do indirectly that which they could not do directly, viz., compel this plaintiff to pay the costs and expenses of the joint venture between the Defendants Macri, on the one part, and A. J. Goerig and this plaintiff, on the other part, by virtue of the purchase of the judgments taken by Defendant Continental Casualty Company arising out of the operation of the joint venture, without these same parties to the joint venture first accounting to this plaintiff and A. J. Goerig in fraud of the contractual rights of the plaintiff, particularly since the Defendant Howe appears only as the agent of the Defendants Macri, and the Macri's acquired these judgments arising out of the joint venture at a percentage on the dollar, and the result of the enforcement of the collection of these judgments would result in the payment of one hundred per cent (100%) of the losses of the joint venture by this plaintiff, contrary to the agreement of the parties, at a profit to the Defendants Macri, even though the joint venture actually lost money.

XXI.

Should the Defendant Herman Howe prevail in Peru, the following inequitable results will prevail: If this plaintiff paid the judgments and attorneys' fees in full, as sought, and looked to A. J. Goerig for a contribution as a result of it, the plaintiff would be paying in full the judgment and attorneys' fees in the sum of \$87,828.81. A. J. Goerig would have available to him the defense, first, that there had been no accounting of the joint venture

between A. J. Goerig and Clyde Philp, on the one part, and between Sam Macri, Don Macri, Joe Macri, this plaintiff and A. J. Goerig, Second, that he, A. J. Goerig, had satisfied all his liability on these judgments by virtue of the release given him by these Defendants Herman Howe, Sam Macri, Don Macri and Joe Macri, leaving the plaintiff to pay in full the judgments with attorneys' fees in excess of \$87,000.00 without contribution, or right thereof, from any of the other joint venturers or partners and without credit for payments previously made, either voluntarily or involuntarily, by any partner.

XXII.

Should the Defendant Herman Howe be permitted to proceed to collect these judgments in Peru, he would be attempting to collect judgments and attorneys' fees in excess of \$87,000.00 on behalf of Sam Macri, Don Macri and Joe Macri, all of whom were joint venturers and copartners with this plaintiff; which same judgments plaintiff believes and alleges were purchased from the Defendant Continental Casualty Company by Sam Macri, Don Macri and Joe Macri from profits arising from the joint venture in which Sam Macri, Don Macri and Joe Macri and A. J. Goerig and this plaintiff were involved, and out of which these same judgments arose, which would be inequitable.

XXIII.

That the defendants, and each of them, should be restrained by this court from in any way prosecut-

ing an action against the Plaintiff Clyde Philp to collect on the judgments described herein, whether in the United States of America or in the country of Peru, without these Defendants Sam Macri, Joe Macri and Don Macri first making an accounting of the joint venture between the above-named defendants and A. J. Goerig and this plaintiff.

By Way of a Second Cause of Action This Plaintiff Complains of These Defendants, and Each of Them, as Follows:

I.

Plaintiff reaffirms paragraphs I to XXII, inclusive, as though they were fully set forth herein.

II.

Plaintiff alleges that the Defendant Continental Casualty Company has been furnishing surety bonds for and on behalf of all the defendants herein, except Herman Howe, before and since the date that the Defendant Continental Casualty Company assigned its various judgments, referred to herein, and has been making a profit from such action.

III.

This plaintiff alleges that the Defendant Continental Casualty Company assigned these judgments to the Defendant Herman Howe as part of a scheme to keep the custom and propitiate the Defendants Sam Macri, Joe Macri and Don Macri to the end that the Defendant Herman Howe would harass and

annoy the Plaintiff Clyde Philp wherever he could be found.

IV.

That at all times herein mentioned the defendants Sam Macri, Joe Macri, Don Macri, Continental Casualty Company and Herman Howe, and each of them, knew that there was an agreement terminating the joint venture between this plaintiff and A. J. Goerig and the defendants Macri, a copy of which termination agreement is attached hereto, as aforesaid, and knew that this plaintiff and A. J. Goerig were liable on such agreement for only fifty-two and one-third per cent ($52\frac{1}{3}\%$) of all loss sustained by the said Sam Macri, Joe Macri and Don Macri in the performance of the contracts covering specifications No. 1062 and No. 1068 when such loss, if any, is ascertained and determined under the conditions of said agreement.

V.

These defendants, as aforesaid, and each of them, knew that this plaintiff and A. J. Goerig had demanded of Sam Macri, Joe Macri and Don Macri that they, the defendants Macri, furnish an accounting of the receipts and disbursements on such contracts and these defendants further knew that the defendants Sam Macri, Joe Macri and Don Macri had failed and refused to furnish any accounting of their receipts and disbursements on the aforesaid contracts.

VI.

Plaintiff alleges that the defendants above named, Sam Macri, Joe Macri and Don Macri and Herman Howe on behalf of themselves and the communities of themselves and their respective wives and the Continental Casualty Company conspired together to harass and annoy this plaintiff Clyde Philp and instituted legal proceedings to compel him to pay one hundred per cent (100%) of the judgments originally satisfied by Continental Casualty Company, although all parties well knew that the liability of this plaintiff Clyde Philp could not exceed fifty-two and one-third per cent ($52\frac{1}{3}\%$) of such judgments.

VII.

These defendants, and each of them, further conspired to damage the credit and reputation of the plaintiff Clyde Philp in the territory and neighborhood where he is engaged in the general construction business, to wit, Lima, Peru, by contacting residents of Peru and advising them that the plaintiff was heavily indebted to these defendants, and giving an incomplete and derogatory view of such judgments and the facts surrounding the taking of them, and by instituting suit in Lima, Peru, in order to collect the total judgments referred to herein, all to plaintiff's damage.

VIII.

That in furtherance of the conspiracy between the defendants, these defendants caused Herman Howe to institute an action in Lima, Peru, on the

judgments which had been frauduently nominally assigned to the defendant, Howe, although each defendant well knew that the courts of Peru and the courts of this nation were being asked to aid the defendants in their completion of an illegal act, namely, to compel plaintiff to pay one hundred per cent (100%) of the judgments to his partners and members of a joint venture because of alleged losses of joint venture and partnership, without there first being had an accounting of this joint venture and partnership, thus allowing the defendants to profit by their own wrong doing and misdeeds in the completion of the contracts of the partnership and joint venture and subsequent actions.

By Way of a Third Cause of Action This Plaintiff
Complains and Alleges as Follows:

I.

Plaintiff reaffirms paragraphs I to XXII, inclusive, of his first cause of action and paragraphs I to VIII of the second cause of action as though fully set forth herein.

II.

That these defendants have slandered the plaintiff, his credits and reputation in Lima, Peru, where plaintiff is in business, by circulating in financial circles in that city the erroneous story that defendants would sue and did sue plaintiff because he did not pay his share of a joint venture and partnership, when in truth and effect these defendants well knew that plaintiff was being asked to pay more

than one hundred per cent (100%) of the alleged losses without these defendants giving an accounting and proving such losses took place.

III.

By such slanderous and illegal conduct of the defendants plaintiff has been damaged in the sum of one hundred thousand dollars (\$100,000.00).

IV.

That as a result of the acts of these various defendants the credit and reputation of this plaintiff, Clyde Philp, has been damaged in the sum of two hundred thousand dollars (\$200,000.00), as alleged in his second cause of action herein.

Wherefore this plaintiff prays that he have judgment against these defendants, and each of them, in his first cause of action for an order restraining them, and each of them, from bringing any action or prosecuting any judgment against this plaintiff which arise out of the assignment to Herman Howe by Continental Casualty Company of the judgments heretofore referred to taken in the United States District Court for the Eastern District of Washington, Southern Division, until these defendants, Sam Macri, Joe Macri and Don Macri, have furnished an accounting of their receipts and disbursements on contracts No. 1062 and No. 1068 of the Roza Division of the Yakima Project, Washington, and until further all liability can be determined by a court of proper jurisdiction.

This plaintiff further prays judgment on his second cause of action against the defendants, and each of them, for damages done to his character and credit in the sum of two hundred thousand dollars (\$200,000.00) by virtue of their unlawful and illegal prosecution of the attempted collection of the judgments recovered by Continental Casualty Company in the United States District Court for the Western District of Washington and which were subsequently assigned to Herman Howe, all to plaintiff's damage.

This plaintiff further prays that he have judgment against the defendants, and each of them, in his third cause of action for his damages in the sum of one hundred thousand dollars (\$100,000.00).

/s/ GRANVILLE EGAN,
Attorney for Plaintiff.

EXHIBIT A

Agreement Terminating Joint Ventures

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a copartnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a copartnership as Goerig & Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

(1) A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.

(2) Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.

(3) Contract No. 12r-14825, Spec. 1062, earthwork, pipe lines and structures, Laterals 69.3 to 69.8 and sublaterals and Diversion Channels. Roza Division, Yakima Project, Washington.

(4) Earthwork pipe lines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

(5) The work to be done on Project 9536, Contract W7412-eng-1, duPont RPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Sub-

contract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4) and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect

to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result 52 $\frac{1}{3}$ % thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

(2) As to Project (5), this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to receive all profits that may come, arise or grow in connection therewith, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same.

(3) Second parties shall pay to first party, as soon as the amount is ascertained, the equipment rentals for first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties

upon Project (5), as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on Project (5).

(4) In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project (1), known and designated as "Val Vue Real Estate Development."

(5) It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second parties upon Project (5) are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00, is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

(6) It is further agreed and understood that there are other joint ventures between the parties

hereto that are not mentioned herein, some of which have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified.

(7) It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

(8) It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in a spirit of

co-operation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such co-operation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

(9) In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties will sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, concurrently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,

By /s/ DON MACRI,
One of Said Firm, but Authorized to Act in This
Matter for it.
(First Party.)

/s/ CLYDE PHILP,
/s/ A. J. GOERIG,
Individually and d/b/a Goerig & Philp and/or A. J.
Goerig Construction Co.
(Second Parties.)

[Endorsed]: Filed February 21, 1957.

[Title of District Court and Cause.]

AMENDED MOTION TO DISMISS

Defendant Continental Casualty Company moves the Court as follows:

1. To dismiss the first cause of action because the complaint fails to state a claim against defendant Continental Casualty Company upon which relief can be granted.
2. To dismiss the second cause of action because the complaint fails to state a claim against defend-

ant Continental Casualty Company upon which relief can be granted.

3. To dismiss the third cause of action because the complaint fails to state a claim against defendant Continental Casualty Company upon which relief can be granted.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ WILLARD E. SKEEL,
Attorneys for Defendant Continental Casualty
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed April 8, 1957.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS JOSEPH MACRI
AND ELEANOR MACRI TO DISMISS

The defendants, Joseph Macri and Eleanor Macri, his wife, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against these defendants upon which relief can be granted.

2. To dismiss the first cause of action set out in plaintiff's Complaint, because it fails to state a claim upon which relief can be granted.

3. To dismiss the second cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

4. To dismiss the third cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

5. To dismiss the action because the Complaint fails to set out a short and plain statement of the claim of plaintiff, as required by Rule 8 (a) (2) of the Rules of Civil Procedures.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Joseph Macri and Eleanor Macri, His
Wife.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS SAM MACRI AND
PAULINE MACRI, HUSBAND AND
WIFE, AND DON R. MACRI AND KATH-
LEEN N. MACRI, HUSBAND AND WIFE,
TO DISMISS

The defendants, Sam Macri and Pauline Macri, husband and wife, and Don R. Macri and Kathleen N. Macri, husband and wife, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against these defendants upon which relief can be granted.

2. To dismiss the first cause of action set out in plaintiff's Complaint, because it fails to state a claim upon which relief can be granted.

3. To dismiss the second cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

4. To dismiss the third cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

5. To dismiss the action because the Complaint fails to set out a short and plain statement of the claim of plaintiff, as required by Rule 8 (a) (2) of the Rules of Civil Procedures.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Sam Macri and Pauline Macri, His
Wife, and Don R. Macri and Kathleen Macri,
His Wife.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

**MOTION OF DEFENDANTS HERMAN HOWE
AND VIOLA B. HOWE TO DISMISS**

The Defendants, Herman Howe and Viola B. Howe, his wife, move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against these defendants upon which relief can be granted.

2. To dismiss the first cause of action set out in plaintiff's Complaint, because it fails to state a claim upon which relief can be granted.

3. To dismiss the second cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

4. To dismiss the third cause of action set out in plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

5. To dismiss the action because the Complaint fails to set out a short and plain statement of the claim of plaintiff, as required by Rule 8 (a) (2) of the Rules of Civil Procedures.

**LYCETTE, DIAMOND &
SYLVESTER,**

Attorneys for Herman Howe and Viola B. Howe,
His Wife.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

MEMORANDUM DECISION AND ORDER

Defendant's motions to dismiss the complaint and each of the three alleged causes of action stated therein have been considered in the light of the various memoranda filed at the oral argument.

The complaint to some extent is violative of Rule 8(a)(2), F. R. Civ. P., requiring "a short and plain statement of the claim" and requires careful study for elimination of conclusions of law and other extraneous matter. On such reading of the complaint it appears that in his first cause of action plaintiff seeks a decree of this court restraining defendants from proceeding in the Peruvian courts to enforce a judgment previously obtained against plaintiff in a district court of the United States. Due to voluntary residence in Peru, as alleged in the complaint, plaintiff is subject to the jurisdiction of the courts of that country. From the record it appears that plaintiff has actively appeared in and thus far unsuccessfully contested the Peruvian lawsuit which he now prays this court to terminate by restraining defendants from further contesting plaintiff's appeal of that case now pending in an appellate court of Peru. In these circumstances the allegations of plaintiff's first cause of action do not state a claim showing plaintiff entitled to either equitable or legal relief.

Both plaintiff's second and third causes of action, while containing scattered, incidental allegations, in

ultimate substance charge defendants with malicious prosecution of a civil action. The law of the state of Washington, controlling in this diversity proceeding under *Erie v. Tompkins*, 304 U.S. 64, clearly forbids the assertion of a claim for damages under the facts alleged in plaintiff's complaint, there being no allegation of arrest of the person or attachment of the property of plaintiff or any other "special injury" not the necessary result of the lawsuit brought by defendants against plaintiff. *Petrich v. McDonald*, 44 Wn. 2d 211 (1954).

It therefore appears that neither the complaint as a whole, nor any of the three causes of action alleged therein, states a claim upon which relief can or ought to be granted. It is therefore

Ordered that plaintiff's complaint and each cause of action alleged therein be and the same hereby is dismissed.

Dated this 19th day of September, 1957.

/s/ GEO. H. BOLDT,

United States District Judge.

[Endorsed]: Filed and entered September 20, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Sam Macri and Pauline Macri, Husband and Wife; Joseph Macri and Eleanor Macri, Husband and Wife; Don R. Macri and Kathleen N. Macri, Husband and Wife; Continental Cas-

uality Company, a Corporation; and Herman Howe and Viola B. Howe, Husband and Wife; and Lycette, Diamond and Sylvester, Their Attorneys, and to the Clerk of the Court:

Please take notice that Clyde Philp, plaintiff herein, by and through his attorney, Granville Egan, hereby appeals to the Circuit Court of Appeals, Ninth District, from that certain judgment of the United States District Court for the Western District of Washington, Northern Division, filed in the Clerk's office September 20, 1957, which judgment dismisses the complaint of the plaintiff. Clyde Philp appeals from each and every part of said judgment.

Dated at Seattle, Washington, this day of October, 1957.

/s/ GRANVILLE EGAN,
Attorney for Clyde Philp,
Plaintiff and Appellant.

[Endorsed]: Filed October 18, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and

Rule 75 (1), FRCP, I am transmitting herewith the following original documents in the file dealing with the above action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed 2-21-57.
2. Bond for costs, Non-resident Plaintiff, filed 2-21-57.
3. Summons with Marshal's return thereon, filed 2-28-57.
4. Appearance for defendants Sam and Pauline Macri and Don and Kathleen N. Macri, by Josef Diamond, filed 3-1-57.
5. Appearance of Joseph Macri, et ux., by Josef Diamond, filed 3-1-57.
6. Appearance of Herman Howe, et ux., by Josef Diamond, filed 3-1-57.
7. Appearance of Continental Casualty Company by Willard E. Skeel, filed 3-11-57.
8. Motion Continental Cas. Co. to Dismiss, filed 3-15-57.
9. Amended Motion to Dismiss, filed 4-8-57.
10. Motion of Defendant Joseph Macri, et ux., to Dismiss, filed 4-22-57.
11. Motion Defendants Sam Macri, et al., to Dismiss, filed 4-22-57.
12. Motion Defendants Herman Howe, et ux., to Dismiss, filed 4-22-57.
13. Note for Hearing of Argument, filed 6-28-57.
14. Motion to Amend, filed by Plaintiff 7-17-57.
15. Note for Motion Docket, filed 7-17-57.

16. Marshal's return on Motion to Amend, filed 7-24-57.

17. Memorandum of Authorities of Defendants on Motion to Dismiss, filed 8-9-57.

18. Memorandum of Authorities on Behalf of Con. Cas. Company, filed 8-9-57.

19. Memorandum of Plaintiff on Motion to Dismiss, filed 8-9-57.

20. Memorandum Decision and Order, dismissing complaint, filed 9-20-57.

21. Notice of Appeal, filed 10-18-57.

22. Cost Bond on Appeal, filed 10-18-57.

23. Stipulation between Clyde Philp and Con. Cas. Co., filed 11-1-57.

24. Additional Designation of Record by Respondent Continental Casualty Company, filed 11-1-57.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 25th day of November, 1957.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15798. United States Court of Appeals for the Ninth Circuit. Clyde Philp, Appellant, vs. Sam Macri, Pauline Macri, Joseph Macri, Eleanor Macri, Don R. Macri, Kathleen N. Macri, Herman Howe and Viola B. Howe, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15798

CLYDE PHILP,

Appellant,

vs.

SAM MACRI and PAULINE MACRI, Husband
and Wife; JOSEPH MACRI and ELEANOR
MACRI, Husband and Wife; DON R. MACRI
and KATHLEEN N. MACRI, Husband and
Wife; CONTINENTAL CASUALTY COM-
PANY, a Corporation; and HERMAN HOWE
and VIOLA B. HOWE, Husband and Wife.

Respondents.

STATEMENT OF POINTS UPON WHICH
THE APPELLANT IS RELYING

1. That the court erred in holding that the plain-
tiff was not entitled to either equitable or legal re-
lief in his first cause of action and in dismissing the
first cause of action of the plaintiff; that the plain-
tiff is entitled to the equitable relief sought;

2. That the court committed error in dismissing
plaintiff's second and third causes of action and in
dismissing them for the reason that a legal cause
of action is stated in each.

/s/ GRANVILLE EGAN,

Attorney for Appellant

Clyde Philp.

Receipt of copy acknowledged.

[Endorsed]: Filed October 28, 1957.

[Title of Court of Appeals and Cause.]

ORDER OF DISMISSAL AS TO
CONTINENTAL CASUALTY COMPANY

This Matter coming on this day before the undersigned Judge of the above-entitled Court for entry of this Order of Dismissal as to respondent Continental Casualty Company and based upon Stipulation signed by Granville Egan, attorney of record for appellant Clyde Philp, and signed by Willard E. Skeel, attorney of record for respondent Continental Casualty Company, stipulating that said appeal as to respondent Continental Casualty Company shall be dismissed and further stipulating that said cause of action and all three causes of action set forth in appellant's complaint as to Continental Casualty Company shall be dismissed with prejudice and without costs to any party, and the Court being otherwise fully advised in the premises, it is, therefore,

Ordered that appellant's complaint and each cause of action alleged therein as to Continental Casualty Company be and the same is hereby dismissed with prejudice and without costs, and it is further

Ordered that appellant's appeal in the above-entitled cause as to respondent Continental Casualty Company be and the same is hereby dismissed with prejudice and without costs.

Done this 22nd day of January, 1958.

/s/ ALBERT LEE STEPHENS,
Judge, United States Circuit Court of Appeals for
the Ninth Circuit;

/s/ WM. HEALY,

/s/ WALTER L. POPE.

Presented by:

/s/ WILLARD E. SKEEL.

Approved for entry 1-15-58.

/s/ GRANVILLE EGAN.

[Endorsed]: Filed January 24, 1958.

✓
No. 15,808

IN THE
United States Court of Appeals
For the Ninth Circuit

THOMAS R. LILE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

GEORGE M. YEAGER,

United States Attorney,

JAY A. RABINOWITZ,

Assistant United States Attorney,

Fairbanks, Alaska,

Attorneys for Appellee.

FILED

MAR 24 1958

PAUL P. O'BRIEN, CLERK

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home in Los Angeles, California. Subsequently Thomas B. Morgan returned to Whiles' home with Paul Ferguson. Thereafter on the 8th or 9th of August, 1954, Thomas B. Morgan, John David Whiles and Paul Ferguson left Los Angeles, California, for Alaska (TR 90). Prior to their departure, Morgan had purchased a 1950 Nash automobile for the anticipated trip to Alaska (TR 187). At the time of purchase of the 1950 Nash, Appellant, Thomas R. Lile, gave Morgan \$500.00 (TR 74, 188). Morgan, Ferguson and Whiles then proceeded to drive to Yosemite National Park where Whiles saw Lile (TR 91). At Yosemite, Morgan received an additional \$100.00 from Lile to pay for the trip to Alaska (TR 189). Morgan, Ferguson, and Whiles then left Yosemite and drove up the Alcan Highway to Fairbanks, Alaska (TR 191).

Morgan, Ferguson and Whiles arrived in Fairbanks, Alaska, on the 15th or 16th of August, 1954 (TR 91). During the next two days they attempted to locate a certain pickup truck but were unsuccessful in their efforts. Morgan then called Lile and informed him that they could not locate the pickup truck. Before noon on the 18th of August, 1954, Morgan and Ferguson returned to the quarters where they had been staying in Fairbanks and at this time Ferguson showed Whiles two trays of diamond rings which he had under his shirt (TR 92, 100). When questioned by Whiles as to where they had obtained the diamond rings, Morgan and Ferguson stated they had gotten them down on the corner. Later that day when asked

by Whiles whether it was the jewelry store on the corner of Noble and Third (Maddux's Jewelry Store) they told Whiles that was the store from which they had gotten the diamonds (TR 93).

During the evening of the 18th of August, 1954, while Whiles accompanied Ferguson to the Fairbanks Post Office, Ferguson threw the boxes which had contained the diamond rings on top of a building (TR 94). Morgan had previously strung the rings on a piece of twine (TR 95). On May 6, 1955, Donald T. Sullivan, Special Agent for the FBI, recovered the empty ring boxes from the roof of the building (TR 147, 149, 150). In the evening of August 20, 1954, Douglas O. Maddux, a Fairbanks jeweler, discovered that two boxes containing more than 83 individual rings (wedding bands, engagement rings and dinner rings) or 40 sets of rings, having a retail value of a "good \$8000.00" were missing from his store and thereupon called the police (TR 13, 16, 17). On August 19, 1954, Morgan and Ferguson were seen together in a store in Fairbanks owned by Robert Claus (TR 156). On August 21, 1954, Morgan, Ferguson and Whiles left Fairbanks, Alaska, at 10:00 a.m. on a Pan American flight to Seattle, Washington (TR 95, 179, 193). Morgan had hung the rings inside of the trousers he was wearing and carried them out of Fairbanks to Seattle in this manner (TR 95). While in Fairbanks Morgan sent a telegram to Lile in San Francisco asking for \$400.00 (TR 75).

Upon their arrival in Seattle, Morgan, Ferguson and Whiles checked into a hotel; Morgan and Fer-

guson occupied a room together. While present in the room occupied by Morgan and Ferguson, Whiles observed Morgan put the stolen rings into an old plastic electric shaver box. Morgan stated to Ferguson and Whiles that he was going to ship the shaving box containing the rings to Lile (TR 95). Morgan then prepared the shaving box for mailing. On the day after their arrival in Seattle, they rented a car to drive to San Francisco, California. As they were driving out of Seattle, Morgan went into a post office (TR 56, 96, 203). During the period they were in Seattle, Morgan called Lile stating to Lile that he wanted \$400.00 and that jewelry had been sent to Lile (TR 75). Before leaving Seattle, Morgan received in Seattle a communication from Lile (TR 206). Under a fictitious name, Lile had wired, by Western Union, \$400.00 to Morgan in Seattle (TR 75, 206).

Upon their arrival in San Francisco, Morgan, Ferguson and Whiles turned in the car they had rented and then flew to Los Angeles, California (TR 96, 204).

Some three to five days after they had arrived in Los Angeles, California, Ferguson asked Whiles to go to Morgan's home, in Los Angeles, to pick up the rings. When Whiles and Ferguson arrived at Morgan's home, Lile was also present. Lile then went and got the rings and gave them to Morgan who in turn gave the rings to Whiles (TR 96). Before leaving Morgan's house, Morgan took one of the rings for his wife and Whiles took a cluster wedding band for himself (TR 97). Whiles then took the rings to Ferguson's home and from there they took the rings to

Abe Martini, on South Main Street, Los Angeles, California. Abe Martini was to sell the rings for them (TR 97). The previous day Ferguson and Whiles attempted to locate Martini to inform him that they had some stuff to get rid of but that it hadn't come down from San Francisco as yet (TR 125).

On September 9, 1954, Morgan was arrested in Los Angeles, California, on suspicion of robbery. That evening Morgan was brought in and questioned by Officer Thomas Buckley, Robbery Division, City of Los Angeles Police Force (TR 36, 38, 39). Morgan stated to Officer Buckley that he, as well as Ferguson and Whiles, went to Alaska for the purpose of finding work (TR 38). However, Morgan testified at the trial that during the months of April, May, June and July of 1954, he was associated in business with one Lile and Camano and that during this period they were selling heavy equipment to a Mr. Lee (TR 186). That after learning there was a surplus of heavy equipment, namely, abandoned tractors in the area of Fairbanks, Alaska, he got together with Lile and decided to come up to Alaska. Thereafter Ferguson and Whiles decided they wanted to come to Alaska. He then contacted Lile to inform him that Ferguson and Whiles also wanted to come to Alaska (TR 187, 188). Lile stated to Special Agent Kintz that he had arranged with Morgan for him to go to Alaska to purchase some tractors for a sale to a client of theirs and that he gave Morgan \$650.00 to come to Alaska (TR 74). Whiles testified that Morgan told him Lile knew a man dealing in black market gold in Alaska and

Lile would be willing to furnish the money to go to Alaska. Lile also told Morgan that they were to pick up the gold when the man got ready to leave Fairbanks with the gold in the back of his pickup truck (TR 222).

When asked by Officer Buckley on September 9, 1954, if he minded if the police searched his house, Morgan stated that he had no objection and handed Officer Buckley the key to his apartment (TR 56). Officer Buckley then tagged Morgan's key and sent Officer Joseph R. Klein to search Morgan's apartment. Officer Klein later returned with a letter (plaintiff's exhibit "G") which he had found in a drawer in Morgan's residence at 4725½ Lexington Avenue, Los Angeles, California (TR 57, 67). On December 13, 1954, Doyle G. Kintz, Special Agent, F.B.I., San Francisco Office, together with George Galloway, another Special Agent, interviewed Lile at his home in San Francisco. Their purpose in going to see Lile was to identify a man by the name of Joe White who had written a letter signed Joe White (TR 68, 69). After being shown a photostatic copy of plaintiff's exhibit "G", Lile admitted to the Special Agents that he had written the letter to his friend, Morgan, and also that he had signed the name of Joe White to the letter (TR 70, 73).

On the 9th day of September 1954, at approximately 7:30 a.m., after having received information that Martini was in possession of stolen property, Officers Buckley and Walker, as well as Sgt. Young, arrested Martini at 1513¼ or 1513½ West Pecos Boulevard,

Apt. #4, Los Angeles, California. At the time of the arrest, Officer Buckley secured a number of rings (plaintiff's exhibit "A") from a pocket of Martini's trousers and two other rings (plaintiff's exhibit "B") which were on top of a radio in Martini's apartment (TR 128, 129, 133, 134, 135).

On January 26, 1955, the grand jury for the Fourth Judicial Division, District of Alaska, returned an indictment charging John David Whiles, Thomas B. Morgan, Paul Ferguson and Joe White, aka, Thomas Robert Lile, with conspiring to commit an offense against the laws of the United States, 18 U.S.C.A. §2314, to-wit, conspiring to transport in interstate commerce stolen property of the value of more than five thousand dollars. The overt act alleged being the transportation of the stolen property from Fairbanks, Alaska, to Seattle, Washington.

On July 15, 1957, defendant Ferguson entered a plea of guilty in Los Angeles, California, pursuant to Rule 20, Federal Rules of Criminal Procedure.

On September 30, 1957, the Appellant and Morgan went on trial before a jury which on October 3, 1957, returned a verdict of guilty as to each defendant.

The Appellant received a sentence of one year, which was suspended. The Court placed him on probation, ordered him to pay a fine of \$300.00 and one-half of the cost of the trial (Vol. 1 TR 49).

A motion for a new trial was denied and an appeal was taken to this Court.

QUESTIONS PRESENTED.

Whether there was substantial evidence from which the jury could find that the value of the stolen jewelry was \$5,000.00.

Whether there was substantial evidence from which the jury could find that Appellant was a member of the conspiracy to transport in interstate commerce stolen jewelry having a value of \$5,000.00.

Whether the conspiracy terminated in Seattle, Washington, or in Los Angeles, California.

ARGUMENT.**I.**

THERE WAS SUBSTANTIAL EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE VALUE OF THE STOLEN JEWELRY WAS \$5,000.

On August 20, 1954, Douglas O. Maddux, owner of a jewelry store in Fairbanks, discovered that two boxes containing more than 83 individual rings or 40 sets of rings, consisting of wedding bands, diamond engagement and dinner rings, were missing from his store (TR 16).

He testified that the cost price was \$4,300 or \$5,300 and the market value of the stolen rings was just about double and would have been in retail a good \$8,000 (TR 17). "Value" means the face, par or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities and money referred to in a single indictment shall constitute the value thereof. 18 U.S.C.A. § 2311.

Mr. McRoberts, the Chief Deputy United States Marshal, testified that in his report of investigation Mr. Maddux verbally identified the pictures of the rings and gave the full retail value of the missing rings as between \$6,000 and \$8,000 (TR 165). He further testified that this figure agreed with Identification 7 which was a copy of an inventory submitted to the City Police by Mr. Maddux (TR 81). Mr. Zaverl, the Chief of Police, testified that Identification 7 was the same as the record in his file (TR 161).

This testimony was more than a scintilla. It was substantial evidence which means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Edison Co. v. Labor Board*, 305 U. S. 197, 229 (1938).

In *Woodard Laboratories v. United States*, 198 F.2d 995, 998 (9th Cir. 1952), this Court said:

“The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. ‘It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.’ *Glasser v. United States*, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680. See *Banks v. United States*, 9 Cir., 1945, 147 F.2d 628.”

John Whiles, a co-conspirator, testified that Ferguson started calling off the numbers that were written on the price tags of these rings that were in the boxes and he wrote the numbers down (TR 93), and the best he could remember it was \$5,120, or

\$5,210 or \$5,220, somewhere along in there. At first appearance this conflicts with Mr. Maddux's testimony, but the jury could have found that he was mistaken or his memory was faulty on this particular point or that all the rings did not contain tags. At least three of the rings recovered in Los Angeles did not have tags on them (TR 18, 23). The question of value was properly submitted to the jury and their finding is sustained by the record.

Appellant states in his brief that the trial court erred in failing to withdraw the case from the jury, evidently meaning the court should have granted a motion for judgment of acquittal, because the Government failed to prove that the jewelry transported in interstate commerce possessed a value of \$5,000. He apparently makes no distinction between a conspiracy to commit an offense against United States as charged in the indictment as a violation of 18 U.S.C.A. § 371, and the substantive offenses of transportation of stolen goods in interstate commerce a violation of 18 U.S.C.A. § 2314.

It was not necessary for the Government to prove that \$5,000 worth of stolen jewelry was actually transported from Fairbanks, Alaska, to Los Angeles, California.

In the case of *Carlson v. United States*, 187 F.2d 366, 369 (10th Cir., 1951) the Court said:

"To establish the conspiracy charge in count one, it was necessary to prove by competent evidence that appellants, by concerted actions, agreements and understandings, undertook to fraudulently

obtain wheat in Oklahoma of a value of \$5,000.00 or more and transport the same in interstate commerce, and that an overt act in furtherance of the conspiracy was committed by one of the conspirators. It was not necessary, however, to prove that wheat of a value of \$5,000.00, or more, or that any wheat in fact was fraudulently obtained and transported. The offense was complete when the unlawful agreement was formulated and an overt act in furtherance thereof was performed. Nor was it necessary that the overt act constitute the crime that was the subject of the conspiracy or even that it itself be a criminal act. Although innocent in itself, an overt act is sufficient to complete the crime of conspiracy if performed in furtherance thereof. *Homes v. United States*, 8th Cir., 134 F.2d 125; *Bergen v. United States*, 8th Cir., 145 F.2d 181, and cases cited. The overt act merely manifests that the conspiracy is at work. *United States v. Offutt*, 75 U.S.App. D.C. 344, 127 F.2d 336."

However, the evidence does support the fact that stolen jewelry of the value of more than \$5,000 was transported to Seattle, Washington, and then mailed to the Appellant in San Francisco, California.

John Whiles testified that Morgan and Ferguson had stolen the rings from the Maddux Jewelry Store and they returned to their dormitory room where Morgan placed them on a piece of brown twine or string (TR 93). Then, Morgan placed the string of jewelry in the wall until the morning of August 21, 1954, when they left on the Pan American plane for Seattle, Washington. At that time Morgan removed the string

of rings and placed them on his belt down inside his trousers and carried the jewelry in this manner from Fairbanks to Seattle (TR 95).

At Seattle, Morgan put the rings in a box and mailed them to the Appellant in San Francisco, California (TR 95). The letter (TR 177, 178) that the Appellant wrote to Morgan explains how the rings got to Los Angeles where Whiles received them from Morgan who had been given them by Lile who was also present at Morgan's house. The rings which were still on the brown string were taken to Abe Martini, who was to sell them (TR 96, 97).

On September 9, 1954, Officer Buckley of the Los Angeles Police Department recovered from Abe Martini part of the stolen rings still attached to the brown string (TR 128, 129) along with others that Mr. Maddux could not definitely identify with the exception of three rings. The value of these recovered rings with blue tags was \$2,102.50 less tax (TR 80). Simply because the police officers in Los Angeles did not recover all the stolen jewelry does not mean that the jewelry in fact was not transported.

Mr. Maddux testified that the recovered rings were the least expensive and even in a pawn shop you couldn't get much for them (TR 31). The expensive jewelry could have been sold in San Francisco or Martini, the receiver in Los Angeles, could have disposed of them before they were recovered by the police on September 9, 1954.

Therefore, in considering the evidence in the light most favorable to the Government (*Bateman v.*

United States, 212 F.2d 61, 70 (9th Cir., 1954); *Schino v. United States*, 209 F.2d 67, 72 (9th Cir., 1953) cert. denied 347 U.S. 937 (1954)), the trial court did not err in denying Appellant's motion for judgment of acquittal.

II.

THERE WAS SUBSTANTIAL EVIDENCE FROM WHICH THE JURY COULD FIND THAT APPELLANT WAS A CO-CONSPIRATOR.

It has been held that proof of a conspiracy may be by circumstantial evidence and often by overt acts alone. (*Marino v. U. S.*, 91 F.2d 691, 698 (9th Cir., 1937); *Blumenthal v. U. S.*, 158 F.2d 883, 889 (9th Cir., 1946) affirmed 332 U.S. 539 (1948); *Glasser v. U. S.*, 315 U.S. 60 (1942).) The existence of a conspiracy may be inferred from the acts of persons which are done in pursuance of an apparent criminal purpose. (*Nye & Nissen v. U. S.*, 168 F.2d 846, 852 (9th Cir., 1948); *U. S. v. Migliorino*, 238 F.2d 7, 9 (3rd Cir., 1956).) In the case of *Poliafico v. U. S.*, 237 F.2d 97 (6th Cir., 1956) the Court states at page 104 of its opinion:

“Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances.”

and further at page 106 of its opinion the Court stated:

“Almost always, the crime is a matter of inference, deduced from the acts of the persons ac-

cused, which are done in pursuance of an apparent criminal purpose. *Stack v. United States*, 9th Cir., 27 F.2d 16; *Pearlman v. United States*, 9th Cir., 20 F.2d 113. The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose. *Marino v. United States*, 9th Cir., 91 F.2d 691 . . .’”

See also *Blumenthal v. U. S.*, *supra*, 158 F.2d 883, 889.

There was substantial evidence from which the jury could find that on or about the 20th day of August, 1954, Thomas B. Morgan, Paul Ferguson and John David Whiles conspired in violation of 18 U.S.C.A. § 371, to commit an offense against the laws of the United States, more particularly 18 U.S.C.A. § 2314. There was evidence that on the morning of August 18, 1954, Morgan and Ferguson returned to their lodgings in Fairbanks, Alaska, with two trays of diamond rings which were concealed under Ferguson’s shirt (TR 92, 100). They later admitted to Whiles that they had stolen the diamond rings from Maddux’s Jewelry Store, Fairbanks, Alaska (TR 93). Morgan then strung the stolen rings on a twine and Ferguson subsequently threw the empty ring trays on top of a roof building in Fairbanks (TR 95). Whiles testified that Morgan and Ferguson told him that his “cut” was to be one-third of the stolen diamond rings (TR 225). On August 20, 1954, Douglas O. Maddux, owner of Maddux Jewelry Store discovered that two boxes containing more than 83 individual rings, having a value of over \$5,000, were missing from his store (TR 13,

16, 17). On May 6, 1955, Donald T. Sullivan, Special Agent, F.B.I., recovered the empty ring boxes from the roof where they had been thrown by Ferguson (TR 147, 149, 150). On August 21, 1954, Morgan, Ferguson and Whiles left Fairbanks together by plane to Seattle, Washington. Morgan had hung the rings inside of his trousers and carried them out of Fairbanks to Seattle in this manner (TR 95).

Further, there was evidence that after their arrival in Seattle, Morgan mailed the stolen jewelry to Lile in San Francisco (TR 95, 96). The evidence also disclosed the attempts of Morgan, Ferguson and Whiles to dispose through one Martini, of the stolen jewelry in Los Angeles (TR 96, 125).

The jury could find from the circumstantial and direct evidence as to these acts of Morgan, Ferguson and Whiles, done in pursuance of an apparent criminal purpose, that they had conspired to transport the stolen jewelry in interstate commerce.

In the case of *Poliafico v. U. S.*, 237 F.2d 97 (6th Cir., 1956), the Court at page 104 of its opinion commented as follows:

“A conspirator may join at any point in the progress of the conspiracy and be held responsible for all that may be or has been done; *Braverman v. U. S.*, 6th Cir., 125 F.2d 283 . . . ; and the foregoing applies to those appellants who did not participate in the formation of the conspiracy, but joined it at various times thereafter, . . .”

In *Marino v. U. S.*, 91 F.2d 691 (9th Cir., 1957), this Court stated at page 696:

“In the situation where a conspiracy has been formed, the joinder thereof by a new member does not create a new conspiracy, does not change the status of the other conspirators, and the new member is as guilty as though he was an original conspirator . . .

“One who commits an overt act with knowledge of the conspiracy is guilty, even though he is absent when the crime, which is the object of the conspiracy, is committed. Such person’s knowledge as to the scope of the conspiracy, may be limited, and he need not know all the details of the plan or the operations. Knowledge of membership in the conspiracy, the part played by each of the members . . . is immaterial. He must know the purpose of the conspiracy, however, otherwise he is not guilty.”

This Court stated at page 852 of its opinion in the case of *Nye & Nissen v. U. S.*, 168 F.2d 846 (9th Cir., 1948) that:

“Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it. *Meyers v. United States*, 6 Cir., 94 F.2d 433, certiorari denied 304 U.S. 583 . . . ; *Phelps v. United States*, 8 Cir., 160 F.2d 858.”

See also *Poliafico v. U. S.*, *supra*, 237 F.2d 97, 104.

The evidence was more than slight from which the jury could find beyond a reasonable doubt that Appellant, Thomas R. Lile, joined the August, 1954, conspiracy entered into by Morgan, Ferguson and

Whiles in Fairbanks to transport stolen jewelry of the value of \$5,000 in interstate commerce.

The jury had before it considerable evidence pertaining to the association of Lile with Morgan, Ferguson and Whiles prior to their arrival in Fairbanks on August 15 or 16, 1954. Morgan and Lile, during the months of April, May, June and July, 1954, were associated in business (TR 185, 186, 187). Whiles testified that Lile initiated the trip to Fairbanks for the purpose of obtaining black market gold, and that Lile helped finance the trip up to Alaska in that he gave Morgan \$500.00 to purchase a 1950 Nash. Later in Yosemite National Park, Lile gave Morgan an additional \$100.00, as Morgan was in need of funds throughout the entire period in question (TR 189).

Pertaining to the time Whiles, Morgan and Ferguson were in Fairbanks, Whiles testified that on or about the 17th or 18th of August, 1954, Morgan telephoned Lile from Fairbanks. While in Fairbanks, Morgan also sent a telegram to Lile in San Francisco asking for an additional \$400.00 (TR 75, 92).

After Morgan, Ferguson and Whiles had arrived in Seattle from Fairbanks, on their return to Los Angeles with the stolen jewelry, Morgan again called Lile in San Francisco. Morgan informed Lile that he needed \$400.00 and certain jewelry had been sent to him at the Greyhound Bus Depot in San Francisco (TR 75). Special Agent Kintz testified that Lile told him he had sent an additional \$400.00 to Morgan in Seattle, and that he had used a fictitious name to

wire the money to Morgan in care of a downtown Western Union Office in Seattle (TR 75).

Morgan testified that after his arrival in Seattle from Fairbanks, he sent telegrams to Lile in Yosemite National Park and to San Francisco asking Lile for \$400.00 (TR 209). Morgan also testified that he did receive \$400.00 from Lile, the latter having wired the money to a Western Union Office in downtown Seattle (TR 205).

Whiles also testified that when present in a hotel room in Seattle occupied by Morgan and Ferguson, he observed Morgan put the stolen rings in an old plastic electric shaver box in preparation for mailing and that Morgan at the time stated he was going to send the rings to Lile. This was the last time Whiles saw the electric shaver box (TR 95, 96). Morgan testified to mailing a package to Lile from Seattle after arriving from Fairbanks, but contended the package did not contain any jewelry (TR 215). Whiles gave testimony that as Morgan, Ferguson and himself were driving out of Seattle on their way to San Francisco, Morgan went into a post office (TR 96). Special Agent Kintz testified at the trial that Lile stated he had picked up two packages from the Greyhound Bus Depot in San Francisco, and that one of the packages contained a box with rings (TR 75).

There was evidence that approximately three to five days after they had arrived in Los Angeles, Ferguson and Whiles went to Morgan's home to pick up the stolen rings. When they arrived at Morgan's home Lile was there, and that it was Lile who went and got

the rings and then gave them to Morgan who in turn gave them to Whiles (TR 96). On the previous day Whiles and Ferguson went to Martini's to let him know they had some "stuff" to get rid of but that it had not come down from San Francisco as yet (TR 125).

After Morgan's arrest on September 9, 1954, a letter (plaintiff's exhibit "G") was found in a drawer in Morgan's apartment in Los Angeles (TR 36, 38, 39, 57, 65, 67). Special Agent Kintz testified that on December 13, 1954, in San Francisco, Lile admitted that he had written plaintiff's exhibit "G" to his friend Morgan and also that he had signed the name Joe White to the letter (TR 70, 73).

The letter which Lile sent to Morgan reads as follows:

"DESTROY - this - LETTER

"I would like to swap the bat set I got from you for one of these elict.

"San Francisco
Calif
Aug. 25, 1954

"Friend Tom:

"Rec. your call last night have been neglecting business waiting for you to come by.

"You know my friend I never approved of the trip up, and how sure I was it would be a failure, you just forced it onto me.

"Now my deal was we all put up 5 each as expense, well I put up my 5 plus another. You guaranteed me we would get the jar any way,

well if you had took my advice on how to handle it we would have got it most likely.

“Now after I put up the dough you fellows are still working on your own, I am to receive and sell the stuff for free.

“Your big expense was the car well who gets the car.

“You see what I am geting at is, I don’t like to do things against my wishes, then get no breaks at all.

“If you had took my advice six weeks ago and sent a camper up to camp at the gate and telephoned when the ice freeze started south, you could have met the truck and been a couple hundred pounds better off. No you are nervous and to many irons in the fire.

“I will be down there the very first of the week and will bring everything you have here. the last package arrived in a little bad shape, but I don’t think it had been opened. I took it to a friend of mine he figured 390 points and offered 400 for them. he got a kick out of the prices on them, he sais, the jewelry protection association makes it impossible to sell them through a store as every police, and assoc. detective plus the hundreds of salesmen watch so close, no one would take a chance. the only safe way is to take out and melt everything. Any way the market is flooded with that junk. the stuff in demand is over one.

“I will bring this down to you and you can pay me what you owe me and take it or else call me and I will sell it here.

“The big boy is very active buying and selling and is good for 7 if handled right. I don’t know

yet what the score is on our friend but expect to learn something when I see him, so stay away from him I dont want any more failures.

“As ever

/s/ Joe White”

(This letter was properly admitted into evidence only as to Appellant. See *Delli Paoli v. U. S.*, 352 U.S. 232, 237 (1957).)

Analysis of the evidence outlined above discloses that there was more than slight evidence to connect Lile with the conspiracy to transport the stolen jewelry in interstate commerce. In view of the evidence as outlined above the jury could have found that Lile joined and then aided or assisted in the furtherance of the conspiracy, having knowledge of the purpose of the conspiracy, although he may not have known all of the details of the conspiracy, or the parts played by Morgan, Ferguson and Whiles in the conspiracy.

The letter which Lile wrote to Morgan, shortly after Morgan's return to Los Angeles from Fairbanks, indicates that Lile knew prior to receipt of the packages therein mentioned that he was being sent stolen jewelry from a source outside of the State of California as part of the conspiracy. The language “I don't like to do things against my wishes, then get no breaks at all” clearly demonstrates that there was consent on Lile's part. The letter taken in conjunction with the fact that Lile was aware Morgan was in need of money shows that Lile was aware that Morgan was sending him stolen jewelry. From the letter, While's testi-

mony as to Morgan's preparing the jewelry for mailing from Seattle to Lile in San Francisco, the circumstantial evidence as to the mailing of the jewelry to Lile from Seattle and Morgan's telephone conversation with Lile from Seattle, the jury could have found that Lile received the stolen jewelry with prior knowledge of the purpose of the conspiracy and in furtherance of the conspiracy.

In *U. S. v. Crimmins*, 123 F.2d 271 (2nd Cir. 1941), a case which involved a conspiracy to transport in interstate commerce stolen securities, Judge Hand wrote at page 273 of his opinion:

"In the case at bar it might have been an implied term of the agreement that Crimmins should take bonds coming from any source; if it had been, he could have been found guilty of the conspiracy, for such an agreement would have dealt with the place of the theft, even though it did no more than provide that the place made no difference. A continued indifference to the source of the bonds, coupled with knowledge that in some cases they had come from beyond the state, would have been evidence of such an agreement . . ."

See also *Baugh v. U. S.*, 27 F.2d 257, 260-261 (9th Cir., 1928).

From the evidence as set forth above the jury could find that Lile also aided or assisted in furtherance of the conspiracy, with knowledge of the purpose of the conspiracy when he wired under a fictitious name the \$400.00 to Morgan in Seattle. There was also circumstantial evidence of Lile's transporting the stolen

jewelry from San Francisco to Morgan's home in Los Angeles which tied in with Lile's letter to Morgan as it pertained to the bringing of the jewelry by Lile to Los Angeles from San Francisco. See *Lutwak v. U. S.*, 344 U.S. 604, 618 (1953).

It was not necessary for the evidence to show that Lile had a financial interest in the conspiracy. His interest may have been that of seeking by action, to make the venture succeed. Lile's knowledge or lack of knowledge of the division of the spoils is immaterial. The stake is in the success of the enterprise (*Marino v. U. S.*, supra, 91 F.2d 691, 696; *Poliafico v. U. S.*, supra, 237 F.2d 97, 107).

Viewing the evidence and the inferences to be drawn therefrom in the light most favorable to the appellee, there was substantial evidence to support the jury's verdict finding Thomas R. Lile guilty of conspiracy (*Nye & Nissen v. U. S.*, supra, 168 F.2d 846, 851; *Schino v. U. S.*, supra, 209 F.2d 67, 72, cert. denied, 347 U.S. 937 (1954); *Penosi v. U. S.*, 206 F.2d 529, 530 (9th Cir., 1953); *Bateman v. U. S.*, supra, 212 F.2d 61, 70-71).

III.

THE CONSPIRACY DID NOT TERMINATE
IN SEATTLE, WASHINGTON.

It has been held that once a conspiracy has been established it is presumed to continue until the contrary is established (*Marino v. U. S.*, supra, 91 F.2d 691, 695; *Coates v. U. S.*, 59 F.2d 173, 174 (9th Cir., 1932)). A conspiracy continues as long as the evidence shows an intention to continue it (*Bellande v. U. S.*, 25 F.2d 1, 2 (5th Cir., 1928)), or until the consummation of the purpose of the conspiracy (*Nyquist v. U. S.*, 2 F.2d 504, 505 (6th Cir., 1924)). The termination of a conspiracy need not coincide with the completion of the crime nor even with the arrest of a conspirator (*Ferris v. U. S.*, 40 F.2d 837 (9th Cir., 1930)).

There was substantial evidence in the record to indicate that the conspiracy was not limited to the transportation of the stolen jewelry from Fairbanks to Seattle. The evidence clearly indicated that the conspirators intended to transport the jewelry in interstate commerce from Fairbanks, Alaska, to Los Angeles, California. The allegation of the overt act in the indictment did not limit the scope or object of the conspiracy to transportation in interstate commerce from Fairbanks to Seattle only. This Court stated in *Baugh v. U. S.*, 27 F.2d 257 (9th Cir., 1928) at page 260 of its opinion:

“Ordinarily, it is true, the averment of an overt act is not intended to be a statement of the object of the conspiracy . . .”

See also: *Johns v. U. S.*, 195 F.2d 77, 78 (5th Cir., 1952).

CONCLUSION.

It is respectfully submitted that the judgment entered by the District Court should be affirmed.

Dated, Fairbanks, Alaska,
March 14, 1958.

GEORGE M. YEAGER,
United States Attorney,

JAY A. RABINOWITZ,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

UNITED STATES CODE ANNOTATED

18 §371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

UNITED STATES CODE ANNOTATED

18 §2314. *Transportation of Stolen goods, securities, monies, or articles used in counterfeiting.* Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. June 25, 1948, c. 645, 62 Stat. 806, amended May 24, 1949, c. 139, § 45, 63 Stat. 96.

No. 15811

In the
United States Court of Appeals
For the Ninth Circuit

MONTE G. MASON,

Appellant,

vs.

ERNEST UTLEY, Trustee in Bank-
ruptcy of the Estate of Monte G. Mason,
Also Known as M. G. Mason,

Appellee.

Appeal from the United States District Court for the
Southern District of California, Central Division

Appellant's Opening Brief

FILED

APR 15 1958

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In the
United States Court of Appeals
For the Ninth Circuit

MONTE G. MASON,

Appellant,

vs.

ERNEST UTLEY, Trustee in Bankruptcy of the Estate of Monte G. Mason,
Also Known as M. G. Mason,

Appellee.

No. 15811

Appellant's Opening Brief

JURISDICTION

A petition in involuntary bankruptcy naming appellant as the alleged Bankrupt was filed on December 27, 1956, (R. 3-8),¹ and an Amended Petition in Involuntary Bankruptcy was filed on March 11, 1957, (R. 9-15), containing, among other things, certain alleged acts of bankruptcy by petitioner.

On April 2nd, 1957, a Notice of Motion to Dismiss the Petition and for a More Definite Statement was filed on behalf of appellant by his then attorney, Law-

¹The reference preceded by the letter "r" are to the Transcript of Record on Appeal.

rence J. Rittenband (R. 16-7), supported by a Memorandum of Points and Authorities. (R. 17-18).

After hearing, the Referee in Bankruptcy issued his order on Motion to Dismiss, wherein he in part ruled that Paragraph *IV-A* of the Amended Petition (see above) stated a valid act of bankruptcy, and reserved ruling as to whether Paragraph *IV-B* of said Petition stated a valid act of bankruptcy (R. 18-19). Notice of said ruling was filed on April 23rd, 1957 (R. 19-20) and on May 20, 1957, the adjudication of Bankruptcy against appellant was entered.

On May 23, 1957, appellant, by his then attorney, Lawrence J. Rittenband, filed a Notice of Motion to set aside the Adjudication of Bankruptcy (R. 22-23) together with an Answer to the Amended Involuntary Bankruptcy Petition (R. 20-22), and his Affidavit as to the reasons for his failure to file said Answer sooner (R. 23-26).

On June 18, 1957, a hearing upon said Motion was held before the Referee in Bankruptcy (R. 27-49), and on June 26, 1957, said Motion to Set Aside the Adjudication in Bankruptcy was denied (R. 49-50).

On July 2, 1957, appellant's present attorney was substituted in lieu of his prior attorney (R. 51).

Thereafter, on July 3, 1957 a Petition for Review was sent to the Clerk of the Court, and on July 23, 1957, a Supplemental Petition for Review was filed in the within matter (R. 52-56), a hearing thereon was

held (R. 57-71), and the Referee certified the matter for review to the United States District Court (R. 71-77).

On November 15, 1957, the United States District Court entered *nunc pro tunc*, its Order in this matter (R. 78-79), confirming the Referee's denial of the Motion to Set Aside Adjudication of June 26, 1957 and the Adjudication of May 20, 1957, and holding that the Amended Petition stated an act of Bankruptcy within the meaning of Section 3 A (1) of the Bankruptcy Act (11 U.S.C. Section 21(a)(1) (1952) (R. 78-79).

Notice of Appeal was filed on November 25th, 1957.

THE STATUTE INVOLVED

The Statute involved in this case is 11 U.S.C. Section 21 (a) (1) and Section 1 (22).

Section 21 (a) (1) provides:

- (a) Acts of Bankruptcy by a person shall consist of his having (1) concealed, removed or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them, or made or suffered a transfer of any of his property, fraudulent under the provisions of Section 107 or 110 of this title. . . .

Section 1 (22) provides:

- (22) Conceal shall include secrete, falsify and mutilate.

STATEMENT ON POINTS OF APPEAL

A concise treatment of the points upon which Appellant intends to rely in this appeal are as follows:

I. That the District Court erred in confirming the Adjudication of Bankruptcy against appellant in that the Involuntary Petition and Amended Petition do not state any legally cognizable acts of bankruptcy; that the adjudication of the bankruptcy herein is illegal and contrary to the law.

II. That the District Court erred in sustaining the refusal of the Referee in Bankruptcy to vacate the adjudication in bankruptcy and to permit appellant to file an Answer to the Petition and Amended Petition, to have a trial by jury, and to a hearing on the merits.

DISCUSSION

I.

THE DISTRICT COURT ERRED IN CONFIRMING THE ADJUDICATION OF BANKRUPTCY AGAINST APPELLANT.

The District Court erred in confirming the Adjudication of Bankruptcy against Appellant, because the alleged acts of bankruptcy alleged in the Amended Petition which he found to be such alleged acts as are stated in Paragraph IV-A of the Amended Petition, are not in law properly acts of bankruptcy.

All that said paragraph IV-A alleges is that Petitioner was examined in a State Court proceeding, that in substance he testified that he had no property, and that he thereby concealed certain alleged interests in a house, an oil well and other items. (R. 11-12).

It is basic law that the Court has no jurisdiction to promulgate an Adjudication of Bankruptcy where the Petition fails to plead one or more acts of bankruptcy cognizable under the Bankrupt Act.

See, e.g., *In Re D. F. Herlehy Co.*, 247 Fed. 369;
In re Schwartz, 9 Fed. Supp. 89, App. Dism. 76
 Fed. 2d, 863;
In re Diamond Fuel Co., 283 Fed. 108; cert.
 den. Sub nom Canute;
*S. S. Co. vs. Philadelphia and West Virginia
 Coal Co.*, 43 S. Ct. 89 Affirmed S. Ct. 67;
In re Gayner Homes, 65 Fed. 2d. 378.

Here Paragraph IV-A merely states that Petitioner allegedly testified falsely in a *State proceeding*, not that he concealed anything from the Bankrupt Court, and not that there was anything in fact concealed, as distinguished from mere testimony about it.

It is respectfully submitted that htere is no act of bankruptcy included in The Bankruptcy Act consisting of *false testimony concerning* past or present activities or facts.

The concealment of property enumerated in the Code as an act of bankruptcy means an actual, physi-

cal concealment of property, and not false testimony concerning the property.

See, e.g. *Continental Bank & Trust Co. vs. Winter*, 153 Fed. 2d 397;

In re Wilmington Hosiery Co., 120 Fed. 180;

In re Filer, 108 Fed. 209;

In re Shoemith, 135 Fed. 684.

Moreover, allegations of acts of bankruptcy must be based on something more than hearsay, rumors or suspicion.

In re Blumberg, 133 Fed. 845;

In re McGraw, 254 Fed. 442;

In re Guaranty Building & Loan Association, 49 Fed. 2d, 776;

In re O'Neil, 266 Fed. 530;

In re Hollywood Land & Water Co., 41 Fed. 2d, 778.

In the *Continental Bank* case, *supra*, the Court in part stated:

“Property is concealed or permitted to be concealed within the meaning of those terms in the definition of the first act of bankruptcy in paragraph 3, sub. a, when a person does, or permits to be done, anything with intent to hinder, delay or defraud his creditors which prevents, or tends to prevent the discovery of the property. Proof of concealment, however, requires something more than a mere failure to volunteer information to

creditors. *In re Shoesmith*, 7 Cir. 135 F. 684. It follows that neither the failure of the appellee to notify the appellant that she had executed the waiver nor her failure to keep control or possession of it were acts of bankruptcy and that the only possible act of bankruptcy alleged in the proposed amendment was a transfer perfected more than four months before the involuntary petition was filed." (153 Fed. 2d., at page).

Allegations in words of the Statute of acts of bankruptcy, are insufficient.

See, e.g., *In re Sumberes*, 254 Fed. 442;
Meek vs. Beezer, 28 Fed. 2d 343, cert. den. 49
 S. Ct. 177.

An alleged act of bankruptcy in the payment of certain sums to the Probation Department of Los Angeles County under the order of restitution made by the Superior Court is not an act of bankruptcy.

Cf., *Park Lane Dresses, Inc. vs. Houghton*, 54
 Fed. 2d. 33.

It is obviously not made, and it is not alleged in the petition that it was made, "with intent to hinder, delay or defraud his creditors or any of them" and plainly does not constitute the making or suffering the transfer of any of his property fraudulently under the provisions of the Bankruptcy Act.

It is patent, also, that the statement in the petition as to alleged acts of bankruptcy "presently unknown," does not constitute an allegation of an act of bankruptcy.

Moreover, the *facts* relied upon to establish concealment must be set forth in the petition fully, and specific facts concerning the particular disposition must be alleged.

See, e.g., *Providence Box & Lumber Co. vs. Goodrich Daniell Lumber Corp.*, 80 Fed. Supp. 61;

In re Heltman-Thompson Co., 83 Fed. Supp. 156;

Matter of Myers, 31 Fed. Supp. 636;

In re Rosenblatt & Co., 193 Fed. 638;

In re Condon, 209 Fed. 800;

Matter of Morosco Holding Co., 296 Fed. 516;

Conway vs. German, 166 Fed. 67.

II.

**THE DISTRICT COURT ERRED IN SUSTAINING
THE REFUSAL OF THE REFEREE IN BANK-
RUPTCY TO VACATE THE ADJUDICATION
IN BANKRUPTCY, TO PERMIT APPELLANT
TO FILE AN ANSWER TO THE PETITION AND
AMENDED PETITION, TO A TRIAL BY JURY,
AND TO A HEARING ON THE MERITS.**

The Referee erred in refusing to set aside the adjudication of bankruptcy and in denying to Petitioner the right to file an Answer and for a trial upon the issues created thereby.

In view of the expanded powers vested in Referees in Bankruptcy under Section 38 of the Amendment to the Bankruptcy Act in 1938, the Referees in Bankruptcy clearly have the power to vacate an adjudication or dismiss petitions in bankruptcy and have all of the attendant powers incidental thereto.

As stated in Collier on Bankruptcy (14th Ed.) Vol. 2, p. 1400:

“In all cases where the Referee is empowered to make the adjudication, it appears that he may thereafter vacate such adjudication and dismiss the proceedings.”

That question has been settled by the Supreme Court in *Pfister vs. Northern Illinois Finance Corp.*, (1942), 317 U.S. 144, 63 S. Ct. 133.

In the Matter of Pottasch Bros. Co., Inc., (C.C.A. 2d Cir.) 79 Fed. 2d, 613, Circuit Judge Learned Hand, after reviewing all of the authorities, concluded that the Referee had the same power as any other Court to reconsider and amend his orders, despite the fact that such orders were reviewable by the District Judge.

Under the Rules of Federal Practice, which covers bankruptcy proceedings, except as insofar as they were inconsistent with the Bankruptcy Act or with General Orders, the rule is that a Motion To Set Aside a default judgment in order that the case may be tried upon the merits *is to be literally construed*, more particularly where the adjudication was the result of mistake, inadvertence or excusable neglect.

See, e.g., *Kuntz vs. Young*, (C.C.A. 8th Cir.), 131 Fed. 719;

Kruell vs. N. Y. Ambassador, Inc., (C.C.A. 2d, 1939), 108 Fed. 2d, 294;

Kwasimur vs. Cardillo, (C.C.A. 3rd, 1949), 175 Fed. 235;

In re Grand, (C.C.A. 3rd, 1946), 153 Fed. 2d 1001;

Gerber vs. Frushter, (C.C.A. 2d 1945), 145 Fed. 2d 120.

Here the facts clearly show that Petitioner at all times objected to being declared a bankrupt, and sought to challenge the allegations of the Petition filed against him. Through the mistake, inadvertence and

excusable neglect of his then lawyer, petitioner has been deprived of his right to file an Answer (R.) to the Amended Petition and of his right to a trial upon the merits.

Plainly it is only in a most extreme case of disregard for procedural legal requirements, of deliberate attempt to misuse the processes of a Court—none of which are present here—that any party should be denied his day in Court and to a full and fair hearing on all issues.

CONCLUSION

The amended petition fails to state an act of bankruptcy under the Bankruptcy Act. The Bankruptcy Court did not acquire jurisdiction in this matter. The adjudication of bankruptcy should be vacated, and the amended petition dismissed, or in the alternative, Petitioner's Answer should be accepted, and he be accorded his day in Court and a hearing upon the issues preserved by the Amended Petition as denied by the Answer.

Respectfully submitted,

WILLIAM STRONG

Attorney for Petitioner.

No. 15811

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONTE G. MASON,

Appellant,

vs.

ERNEST UTLEY, Trustee in Bankruptcy of the Estate of
Monte G. Mason, also known as M. G. Mason,

Appellee.

On Appeal From the District Court of the United States for
the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE.

WILLIAM J. TIERNAN,

215 West Seventh Street,
Los Angeles 14, California,

Attorney for Appellee.

FILED

JUN 12 1958

PAUL P. O'BRIEN, CLERK

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No. 15811

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONTÉ G. MASON,

Appellant,

vs.

ERNEST UTLEY, Trustee in Bankruptcy of the Estate of
Monte G. Mason, also known as M. G. Mason,

Appellee.

On Appeal From the District Court of the United States for
the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE.

Jurisdiction.

Appellee has no objection to the chronological statement of events, which are the basis for the jurisdiction of this court, as is set forth in the Appellant's Opening Brief, except that it should be noted that two petitions for review were filed. The second petition for review is designated as the "Supplemental Petition for Review," and was filed on July 23, 1957, to review the Order of Adjudication made on May 20, 1957.

Statutes Involved.

Appellee concedes that the statutes involved in this case are correctly stated in Appellee's Opening Brief except that a further statute involved is the interpretation of Title 11 U. S. C., Section 39c. The statute provides:

"A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

Points on Appeal.

It is Appellee's contention that the only points on this appeal are as follows:

1. Where an individual testifies falsely in supplementary proceedings concerning the location, nature, and extent of his property does this false testimony constitute an act of bankruptcy?

2. Has the Referee in Bankruptcy or the District Judge abused his discretion in refusing to grant the motion to vacate the Order of Adjudication in these proceedings?

DISCUSSION.

I.

Is False Testimony in Supplemental Proceedings an Act of Bankruptcy?

The facts show that Monte G. Mason, the bankrupt herein, was examined in the Superior Court on Supplementary Proceedings pursuant to the provisions of Sections 714 and 715 of the Code of Civil Procedure.

The transcript (p. 11) contains the language of the amended petition in involuntary bankruptcy relating to the examination, the testimony, and the fact that said testimony was false and misleading.

It is appellee's contention that such testimony and such concealment constituted an act of bankruptcy under Section 3a(1) of the Bankruptcy Act quoted in Appellant's Opening Brief. Appellant's contention to the effect that the testimony was made in a State proceeding and not in the Bankruptcy Court appears to be without merit.

False testimony itself is sufficient to show a concealment.

In re Burg, 245 Fed. 173, 178 (N. D. Tex., 1917);
In re Glazier, 195 Fed. 1020 (M. D. Pa., 1912);
1 Collier, *Bankruptcy* Par. 3.103 (14th ed., 1940);
1 Remington, *Bankruptcy* 123 (5th ed. 1950);
Cf. Continental Bank and Trust Co. v. Winter,
153 F. 2d 397, 399 (2d Cir., 1946).

The word "concealed" as used in Section 3a(1) of the Bankruptcy Act is not limited in meaning to physical secretion.

See:

Coghlan v. United States, 147 F. 2d 233, 236-237 (8th Cir.), *cert. den.*, 325 U. S. 888, rehear. *den.*, 326 U. S. 805 (1945);

United States v. Zimmerman, 158 F. 2d 559 (7th Cir., 1946).

As noted previously, the supplemental petition to review the Order of Adjudication was not filed within the time limit set forth in Section 39 of the Bankruptcy Act.

In the case of *Pfister v. Northern Illinois Finance Corporation*, 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133 (1942); the limitation of Section 39c is a limitation on such filing as "a matter of right."

The authorities in this area have been collected by Judge Yankwich in the case of *In re Steinberg*, 138 Fed. Supp. 462 (1956). In this case Judge Yankwich likewise takes the view that it is discretionary with the court as to whether the review will be heard or not. The question left open is whether or not the petitioner must make some showing so as to cause the court to hear the belated petition. No such showing has been made in this case.

II.

Neither the Referee nor the District Judge Abused Their Discretion in Refusing to Set Aside the Order of Adjudication.

Counsel for the bankrupt made a motion under Rule 60 of the Federal Rules of Civil Procedure, to set aside the Order of Adjudication.

Rule 60(b) provides:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .”

The motion made was accompanied by an affidavit of Laurence Rittenband. [Tr. pp. 23-26.]

At the hearing the original letter sent by the undersigned to Mr. Rittenband was introduced by Mr. Rittenband as an exhibit. [Tr. pp. 25-26.]

The court, after hearing the argument of counsel, made an order denying the motion. [Tr. pp. 49-50.]

At the hearing on the motion, the position of Appellee was thoroughly discussed, *i.e.*, Appellee took the position then, as he does now that the affidavit of Laurence Rittenband set forth no facts whatsoever sufficient to justify the court's making an order setting aside the Order of Adjudication.

The court itself made a specific finding in its order to the effect that the affidavit was insufficient as a matter of law.

The court will note on page 48 of the Transcript that Appellee offered Mr. Rittenband the opportunity to file additional affidavits, which opportunity was not availed of by Mr. Rittenband.

Under General Order 47 of the Bankruptcy Act, the findings of a referee are accepted by the judge unless clearly erroneous.

Under Rule 60 of the Federal Rules of Civil Procedure, the court hearing the motion has discretion as to whether or not it should be granted. See Moore's Federal Practice, Volume 7, page 222, *et seq.*, cases collected in footnote 9.

See:

Jackson v. Heiser, 111 F. 2d 310 (1940).

Conclusion.

It follows that since the petition upon which the Order of Adjudication was made states a valid legal act of bankruptcy and that the court did not abuse its discretion in refusing to set aside said order, the judgment of the referee and of the district court should be affirmed.

Respectfully submitted,

WILLIAM J. TIERNAN,

Attorney for Appellee.

No. 15811

United States
Court of Appeals
for the Ninth Circuit

MONTE G. MASON,

Appellee,

vs.

ERNEST UTLEY, Trustee in Bankruptcy of the
Estate of Monte G. Mason, Also Known as M.
G. Mason,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

No. 15811

United States
Court of Appeals
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MONTE G. MASON,

Appellee,

vs.

ERNEST UTLEY, Trustee in Bankruptcy of the
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM STRONG,
232 North Canon Drive,
Beverly Hills, California.

For Appellee:

WILLIAM J. TIERNAN,
215 West 7th Street,
Los Angeles 14, California.

In the United States District Court, Southern
District of California, Central Division

No. 76001

PETITION IN INVOLUNTARY
BANKRUPTCY

In the Matter of

MONTE G. MASON, Also Known as M. G.
MASON,

Alleged Bankrupt.

To the Honorable Leon R. Yankwich, Judge of the
District Court of the United States for the
Southern District of California:

The verified petition of Erwin P. Werner of
Los Angeles, California, and U. S. Credit Bureau,
Inc., a California Corporation, of Los Angeles, Cali-
fornia, respectfully represents to the Court:

I.

That Monte G. Mason, also known as M. G.
Mason, of 3210 Oak Dell Lane, Studio City, Cali-
fornia, has resided at the above address and has had
his domicile within the above judicial district for
a longer portion of the six months immediately
preceding the filing of this petition than in any
other judicial district.

II.

That the said Monte G. Mason, also known as
M. G. Mason, owes debts to the amount of \$1,000 or
more and is not a wage earner or a farmer but is

engaged in the business of oil leasing and promotional oil activities and in the drilling and exploration for oil. [2*]

III.

Your petitioners are creditors of the said Monte G. Mason, also known as M. G. Mason, having provable claims against him, fixed as to liability and liquidated in amount, amounting in the aggregate in excess of the value of securities held by them to \$500, or more. The nature and amount of your petitioners' claims are as follows:

A. The petitioner Erwin P. Werner holds an unsatisfied judgment against the alleged bankrupt entered August 25, 1954, in the Superior Court of the State of California for the County of Los Angeles, Case No. 620670 in the amount of \$8,565.18, together with interest, to date.

B. The petitioner, U. S. Credit Bureau, Inc., holds an unpaid judgment as assignee of Esther Ann Cotton, rendered on or about September 25, 1951, in the Municipal Court of Los Angeles County, Case No. 1041792, in the amount of \$2,-557.14, plus interest to date.

C. The petitioner, U. S. Credit Bureau, Inc., holds an unpaid judgment as assignee of Kay Sims, rendered on or about March 20, 1952, in the Municipal Court of Los Angeles County, Case No. 767, in the amount of \$1,109.79, plus interest to date.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

IV.

That within four months last preceding the filing of this petition the said Monte G. Mason, also known as M. G. Mason, committed an act or acts of bankruptcy in that he did heretofore to wit while insolvent:

A. On December 6, 1956, the alleged bankrupt was examined in supplementary proceedings before the Honorable Clarence Johns, Commissioner in and for the Superior Court of Los Angeles County. That in the course of his testimony the alleged bankrupt concealed or permitted to be concealed property and interests in property, both real and personal with intent to hinder, delay, and defraud his creditors.

B. That the alleged bankrupt did in connection with an Order of Restitution made by the Los Angeles Superior Court in connection with that case entitled People of the State of California vs. Mason, [3] No. 112872, pay to the Probation Department of Los Angeles County, the sum of \$300.00 on or about the first day of October, 1956; November, 1956, and December, 1956. That said payment constituted a preferential transfer as defined in Subdivision A of Section 60 of the Bankruptcy Act, same being made on behalf of antecedent creditors of the alleged bankrupt, whose names are presently unknown to these petitioners.

C. Petitioners allege upon information and belief that the aforesaid alleged bankrupt committed

an act of bankruptcy by conveying, transferring, concealing, removing, or permitting to be concealed or removed certain portions of his property, both real and personal, to his wife with intent to hinder, delay, or defraud his creditors within the four months' period preceding the filing of this petition. That the exact nature and times when these acts occurred are presently unknown to your petitioners and leave will be sought to amend this petition when the same are discovered.

D. Petitioners allege upon information and belief that the aforesaid alleged bankrupt committed an act of bankruptcy by conveying, transferring, concealing, removing, or permitting to be concealed or removed, certain of his properties to a corporation or corporations known as Americol Petroleum, Inc., a Colorado corporation; Modeco, Inc., a Nevada corporation, and M.G.M Petroleum, Inc., a Nevada corporation, with intent to hinder, delay, or defraud his creditors within the four months' period preceding the filing of this petition. That the exact nature and times when these acts occurred are presently unknown to your petitioners and leave will be sought to amend this petition when the same are discovered.

E. Petitioners allege that the aforesaid alleged bankrupt has committed other and divers acts of bankruptcy, the same being presently unknown to your petitioners. That as and when same are ascer-

tained, leave will be sought to amend this complaint to include said acts. [4]

Wherefore Your Petitioners Pray that service of this petition with a subpoena may be made upon Monte G. Mason also known as M. G. Mason, as provided in the Bankruptcy Act and that he may be adjudged by the Court to be a bankrupt within the purview of said act.

/s/ ERWIN P. WERNER,
Petitioner.

U. S. CREDIT BUREAU, INC.,
Petitioner.

By /s/ GEORGE THORESON,
Vice President.

/s/ WILLIAM J. TIERNAN,
Attorney for Petitioners. [5]

State of California,
County of Los Angeles—ss.

Erwin P. Werner being duly sworn, deposes and says: That he is a petitioner in the within and above-entitled action; that he has read the within and foregoing Petition in Involuntary Bankruptcy and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

/s/ ERWIN P. WERNER.

Subscribed and sworn to before me this 21st day of December, 1956.

[Seal] /s/ WILLIAM J. TIERNAN,
Notary Public in and for Said
County and State.

State of California,
County of Los Angeles—ss.

George Thoreson, being sworn says: That he is the vice president of the U. S. Credit Bureau, Inc., a corporation, the above-named petitioner, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Petition in Involuntary Bankruptcy and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief and as to those matters he believes it to be true.

/s/ GEORGE THORESON.

Subscribed and sworn to before me this 21st day of December, 1956.

[Seal] /s/ ROGER K. LATKY,
Notary Public in and for Said
County and State.

My Commission Expires April 9, 1960. [6]

[Endorsed]: Filed December 27, 1956. [7]

[Title of District Court and Cause.]

AMENDED PETITION IN INVOLUNTARY
BANKRUPTCY

To the Honorable Leon R. Yankwich, Judge of the
District Court of the United States for the
Southern District of California:

The verified petition of Erwin P. Werner of Los Angeles, California; U. S. Credit Bureau, Inc., a California corporation, of Los Angeles, California, and Helen Pantaleoni of Los Angeles, California, respectfully represents to the Court:

I.

That Monte G. Mason, also known as M. G. Mason, of 3210 Oak Dell Lane, Studio City, California, has resided at the above address and has had his domicile within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

That the said Monte G. Mason, also known as M. G. Mason, owes debts to the amount of \$1,000 or more and is not a wage earner or a farmer but is engaged in the business of oil leasing and promotional oil activities and in the drilling and exploration for oil. [8]

III.

Your petitioners are creditors of the said Monte G. Mason, also known as M. G. Mason, having

provable claims against him, fixed as to liability and liquidated in amount, amounting in the aggregate in excess of the value of the securities held by them to \$500.00 or more. The nature and amount of your petitioners' claims are as follows:

A. The petitioner, Erwin P. Werner, holds an unsatisfied judgment against the alleged bankrupt entered August 25, 1954, in the Superior Court of the State of California for the County of Los Angeles, Case No. 620670, in the amount of \$8,565.18, together with interest, to date.

B. The petitioner, U. S. Credit Bureau, Inc., holds an unpaid judgment as assignee of Esther Ann Cotton, rendered on or about September 25, 1951, in the Municipal Court of Los Angeles County, Case No. 1041792, in the amount of \$2,557.14, plus interest to date.

The petitioner, U. S. Credit Bureau, Inc., holds an unpaid judgment as assignee of Kay Sims, rendered on or about March 20, 1952, in the Municipal Court of Los Angeles County, Case No. 767, in the amount of \$1,109.79, plus interest to date.

C. The petitioner, Helen Pantaleoni, holds an unpaid judgment against the alleged bankrupt rendered on or about January 30, 1953, in the Superior Court of Los Angeles County, Case No. 598741, in the amount of \$6,000.00, together with interest at the rate of 7% per annum from December 10, 1951, until paid, and costs of suit.

IV.

That within four months last preceding the filing of this petition the said Monte G. Mason, also known as M. G. Mason, committed an act or acts of bankruptcy in that he did heretofore to wit while insolvent:

A. On December 6, 1956, the alleged bankrupt was examined in supplementary proceedings before the Honorable Clarence Johns, Commissioner in and for the Superior Court of Los Angeles County. That in the course of his testimony the alleged bankrupt concealed or permitted to be concealed property and interests in property, both real and personal with intent to hinder, delay, and defraud his creditors. That the bankrupt testified that he had no interest in real estate and that in truth and in fact the bankrupt concealed a community interest in a residence located at 3210 Oak Dell Lane, Studio City, California, and in addition, the alleged bankrupt concealed in his testimony an interest in an oil well located in the City of Huntington Beach on 16th Street of that city. That the bankrupt testified falsely that he had no interest in six automobiles which are used and operated by members of his family, the title to four of which stand in his wife's name, one Jeanne R. Mason, the other two of which are in the names of children. That the bankrupt concealed an interest in a private airplane, testifying falsely that he had no interest therein and that the proprietary interest in said airplane belonged to his wife; whereas, in truth and

in fact said airplane is community property. That the bankrupt concealed his interest in a bank account, title to which is in the name of his wife, Jeanne R. Mason, which said bank account has been the receipt and depository of community funds and has been used to maintain, support, and pay the expenses of the alleged bankrupt in these proceedings. That the bankrupt concealed his interest and testified falsely concerning his interest in M.G.M Petroleum, Inc., a Nevada Corporation, approximately one million shares of which are held in the name of his wife, the aforesaid Jeanne R. Mason. That said stock was and is community property and was and is controlled and voted by the alleged bankrupt. That the bankrupt falsely testified that there was no community property in existence owed by himself and the said Jeanne R. Mason.

B. That the alleged bankrupt did in connection with an Order of Restitution made by the Los Angeles Superior Court on or about January 5, 1949, in connection with that case entitled, "People of the State of California vs. Mason," No. 112872, pay to the Probation [10] Department of Los Angeles County, the sum of \$300.00 on or about the first day of October, 1956; November, 1956, and December, 1956. That said payment constituted a preferential transfer as defined in Subdivision A of Section 60 of the Bankruptcy Act, same being made on behalf of antecedent creditors of the alleged bankrupt. That said creditors, their names and the amount of their claims are as follows:

Ardis Brink	\$1,500.00
Frank Enders	\$1,500.00
John A. Haslett	\$1,500.00
Liela A. Lowery	\$1,500.00
Lloyd F. Dunn	\$1,500.00
C. R. Bertrand	\$1,500.00
Hayland G. Small	\$1,500.00

C. Petitioners allege that the aforesaid alleged bankrupt has committed other and divers acts of bankruptcy, the same being presently unknown to your petitioners. That as and when same are ascertained, leave will be sought to amend this complaint to include such acts.

Wherefore, your petitioners pray that service of this petition with a subpoena may be made upon Monte G. Mason, also known as M. G. Mason, as provided in the Bankruptcy Act and that he may be adjudged by the Court to be a bankrupt within the purview of said Act.

/s/ ERWIN P. WERNER,
Petitioner.

U. S. CREDIT BUREAU, INC.,
Petitioner.

By /s/ GEORGE THORESEN,
Vice President.

/s/ HELEN PANTALEONI,
Petitioner.

/s/ WILLIAM J. TIERNAN,
Attorney for Petitioners. [11]

State of California,
County of Los Angeles—ss.

Erwin P. Werner, being duly sworn, deposes and says: That he is a petitioner in the within and above-entitled action; that he has read the within and foregoing Petition in Involuntary Bankruptcy and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

/s/ ERWIN P. WERNER.

Subscribed and sworn to before me this 15th day of February, 1957.

[Seal] /s/ WILLIAM J. TIERNAN,
Notary Public in and for Said
County and State.

State of California,
County of Los Angeles—ss.

George Thoresen, being sworn deposes and says: That he is the vice president of the U. S. Credit Bureau, Inc., a corporation, the above-named petitioner, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Petition in Involuntary Bankruptcy and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his in-

formation or belief and as to those matters he believes it to be true.

/s/ GEORGE THORESEN.

Subscribed and sworn to before me this 8th day of March, 1957.

[Seal] /s/ ROGER K. LATKY,
Notary Public in and for Said
County and State. [12]

State of California,
County of Los Angeles—ss.

Helen Pantaleoni, being duly sworn, deposes and says: That she is a petition in the within and above-entitled action; that she has read the within and foregoing Petition in Involuntary Bankruptcy and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information and belief, as to those matters that she believes it to be true.

/s/ HELEN PANTALEONI.

Subscribed and sworn to before me this 21st day of February, 1957.

[Seal] /s/ C. E. PORTER,
Notary Public in and for Said
County and State.

My Commission Expires April 29, 1957.

[Endorsed]: Filed March 11, 1957. [13]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS PETI-
TION AND FOR MORE DEFINITE
STATEMENT

To Erwin P. Werner of U. S. Credit Bureau, Inc.,
and Helen Pantaleoni, and to William J. Tier-
nan, their attorney:

Please Take Notice that on the 11th day of April, 1957, at 10:00 o'clock a.m. of that day, or as soon thereafter as counsel can be heard, before the Honorable David P. Head, Referee in Bankruptcy, the alleged bankrupt herein will move the above-entitled Court for an order dismissing amended petition on file herein on the ground that it fails to state a claim against the alleged bankrupt upon which relief can be granted and for a further order, in the event the motion to dismiss is not granted, that the petitioners be ordered to furnish a more definite statement of the nature of their claims as set forth in the petition because the said petition is so vague and ambiguous that the alleged bankrupt should not reasonably be required to prepare a responsive pleading on the ground that paragraph IV A alleges in vague and general terms only that the alleged bankrupt concealed or permitted to be [14] concealed property and interests in property with intent to hinder, delay and defraud his creditors. Said subdivisions of paragraph IV do not fully apprise the alleged bankrupt of the specific facts concerning the alleged disposition of said

assets made by the alleged bankrupt and the specific property alleged to be concealed or when such concealment allegedly took place.

This motion will be based upon the amended petition in involuntary bankruptcy heretofore filed herein and upon all other papers and proceedings heretofore amended.

Dated April 1, 1957.

/s/ LAURENCE J. RITTENBAND,
Attorney for Alleged Bank-
rupt. [15]

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS
AND FOR MORE DEFINITE
STATEMENT

I.

The facts relied upon to establish concealment in paragraph IV A must be set forth in the petition fully and give the dates when the bankrupt allegedly concealed his assets.

Providence Box and Lumber Co. v. Goodrich
Daniell Lumber Corp., 805 F. Supp. 61;

In re Heltman-Thompson Co.,
83 F. Supp. 156;

Matter of Myers,
31 F. Supp. 636;

In re Rosenblatt & Co.,
193 F. 638;

In re Condon,
209 F. 800;

Matter of Morosco Holding Co.,
296 F. 516;
Conway v. German,
166 F. 67.

II.

The facts stated in paragraph IV B do not constitute a preferential transfer under the Bankruptcy Act.

Collier on Bankruptcy (14th Ed.) Vol. 3, p. 558
(and [16] cases cited therein).

Dated: April 1, 1957.

/s/ LAURENCE J. RITTENBAND,
Attorney for Alleged
Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 2, 1957. [17]

[Title of District Court and Cause.]

ORDER ON MOTION TO DISMISS

This matter came on regularly to be heard before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Los Angeles, California, pursuant to notice thereof.

The alleged bankrupt appeared through his attorney, Laurence J. Rittenband, the Petitioning Creditors appeared through their attorney, William J. Tiernan.

Now, argument of counsel having been heard, good cause appearing, the court makes the following order:

It Is Ordered that Paragraph IV.A. of the Amended Petition states a valid Act of Bankruptcy and as to this paragraph the motion to dismiss be and the same hereby is denied.

It Is Further Ordered that as to Paragraph IV. B. of the Amended Petition, ruling thereon is reserved until the trial of the cause.

It Is Further Ordered that the motion for a more definite statement be and the same is denied.

Dated: April 23, 1957.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed April 23, 1957. [19]

[Title of District Court and Cause.]

NOTICE OF RULING

To Monte G. Mason and to His Attorney, Laurence J. Rittenband:

You will please take notice that on the 16th day of April, 1957, at 2:00 p.m. the Court made its order denying your motion to dismiss and for a more definite statement, and gave you twenty days

to answer the amended petition in involuntary bankruptcy.

/s/ WILLIAM J. TIERNAN,

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 23, 1957. [20]

[Title of District Court and Cause.]

ANSWER TO INVOLUNTARY
BANKRUPTCY PETITION

To David B. Head, Referee in Bankruptcy:

An amended petition having been filed in the above court on or about March 11, 1957, praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, your respondent now appears and answers the said amended petition as follows:

I.

Respondent admits the allegations contained in paragraphs I and III of the amended petition.

II.

Respondent denies each and every allegation contained in paragraph II of the amended petition, except that he admits that he owes debts to the amount of \$1,000.00 or more and that he is not a farmer and except that he is engaged in the business of drilling and exploration for oil. [22]

III.

Respondent denies each and every allegation contained in paragraph IV of the amended petition,

except that he admits that he was examined in supplementary proceedings before the Honorable Clarence E. Johns, Commissioner, in and for the Superior Court of Los Angeles County, and that in connection with an order of restitution made by the Los Angeles Superior Court on or about January 5, 1949, in connection with a case entitled "People of the State of California vs. Mason," No. 112872, paid in the Probate Department of Los Angeles County various sums pursuant to the said order of restitution.

For a Separate, Distinct and Affirmative Defense

IV.

Respondent alleges that he committed no acts of bankruptcy within four (4) months from the time of the filing of the amended petition.

For a Further Separate and Affirmative Defense

V.

The amended petition does not state facts sufficient to constitute a cause of action against the alleged bankrupt.

Wherefore, your respondent prays that a hearing may be had on said amended petition and this answer and that the issue presented thereby may be determined by a jury.

/s/ LAURENCE J. RITTENBAND,
Attorney for Alleged
Bankrupt. [23]

State of California,
County of Los Angeles—ss.

I, Monte G. Mason, also known as M. G. Mason, respondent named in the foregoing answer, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ MONTE G. MASON.

Subscribed and sworn to before me this 22nd day of May, 1957.

[Seal] /s/ MORRIS KASTLE,
Notary Public in and for Said
County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 23, 1957. [24]

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE ADJUDICATION OF BANKRUPTCY AND ORDER TO FILE SCHEDULES

To Erwin P. Werner, U.S. Credit Bureau, Inc., and Helen Pantaleoni, and to William J. Tiernan, their attorney:

Please Take Notice that on Thursday, June 6, 1957, at 10:00 o'clock a.m. of that day, or as soon thereafter as counsel may be heard, before the Honorable David P. Head, Referee in Bankruptcy,

the alleged bankrupt therein will move the above-entitled court for an order setting aside the Adjudication of Bankruptcy filed in the above-entitled matter on May 20, 1957, and to set aside the Order to File Schedules heretofore filed on May 20, 1957, on the ground that said adjudication of bankruptcy was entered through the excusable failure of the alleged bankrupt to file a timely answer to the amended petition hitherto filed, as more particularly appears from the annexed affidavit of Laurence J. Rittenband.

This motion will be based upon the annexed affidavit of Laurence J. Rittenband, the proposed answer to the amended petition [26] and upon all proceedings heretofore had herein.

Dated: May 22, 1957.

/s/ LAURENCE J. RITTENBAND,
Attorney for Alleged
Bankrupt. [27]

AFFIDAVIT OF LAURENCE J. RITTENBAND

Laurence J. Rittenband, being first duly sworn, deposes and says:

That he is the attorney for the alleged bankrupt and is fully familiar with all the papers and proceedings heretofore had herein.

On May 21, 1957, affiant received certified copies of Adjudication of Bankruptcy and Order to File Schedules. The Adjudication of Bankruptcy sets forth that Monte G. Mason, also known as M. G. Mason, was adjudicated a bankrupt because of the

fact that no timely answer had been filed by him. Prior to the expiration of the twenty (20) day period during which the alleged bankrupt was required to file an answer after motion to dismiss the amended complaint was denied, affiant entered into negotiations with the attorney for the petitioning creditors for a possible settlement of the obligations owed by the alleged bankrupt to his creditors. The proposal which was made to the attorney for the petitioning creditors related to the transfer of certain stock owned by the alleged bankrupt's wife in M.G.M. Petroleum Co., Inc., to said creditors. Under date of May 14, 1957, affiant received a letter from Mr. William J. Tiernan, the attorney for the petitioning creditors, a copy of which is attached hereto as "Exhibit A." Upon receipt of the letter of May 14, 1957, to wit, on May 15, 1957, affiant sent a copy of Mr. Tiernan's letter of May 14, 1957, to the alleged bankrupt with the request that the information desired by Mr. Tiernan in his letter of May 14, 1957, be forwarded to me.

Affiant was in the process of preparing the answer to the amended petition, after receipt of the letter from Mr. Tiernan dated May 14, 1957, when the Adjudication of Bankruptcy and the Order to File Schedules were received by affiant. [28]

Affiant has advised the alleged bankrupt that he has a meritorious defense to the amended petition in bankruptcy on the ground that no acts of bankruptcy could be proved against him.

Attached hereto is proposed answer of alleged

bankrupt which affiant requests be filed if the within motion is granted.

Wherefore, affiant prays that because of inadvertence and excusable neglect, the answer to the petition had not been filed and that an order be entered herein vacating the adjudication of bankruptcy and the order to file schedules and that the alleged bankrupt be permitted to file his answer to the amended petition attached hereto.

/s/ LAURENCE J. RITTENBAND,

Subscribed and sworn to before me this 22nd day of May, 1957.

[Seal] /s/ MORRIS KASTLE,

Notary Public in and for Said
County and State.

Affidavit of Service by Mail attached. [29]

EXHIBIT "A"

William J. Tiernan

Attorney at Law

Suite 612

215 West Seventh Street

Los Angeles 14, California

May 14, 1957.

Mr. Laurence J. Rittenband

210 West Seventh Street

Los Angeles 14, California

Re: Monte G. Mason

Dear Mr. Rittenband:

The proposal that you discussed with me concerning the issuance of stock in M.G.M. Petroleum

Company, Inc., is definitely of interest to my clients.

Before further consideration may be given to this we need to have the balance sheet and operating statement of the company as well as a description of its capital structure.

If this is agreeable, please return these documents together with a precise offer and I will take it up with my clients. In the meantime, please file your answer to the amended petition and please advise me of an agreeable date for the production of Mrs. Mason or I will assume that you prefer to have me subpoena her for her examination.

Very truly yours,

/s/WILLIAM J. TIERNAN.

WJT:lmc

[Endorsed]: Filed May 23, 1957. [30]

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 76,001-WM

In the Matter of:
MONTE G. MASON,

Bankrupt.

Before: Honorable David B. Head, Referee in
Bankruptcy.

Heard by: Honorable Ronald Walker, Referee in Bankruptcy.

HEARING RE: MOTION TO SET ASIDE
ORDER OF ADJUDICATION

The following is a stenographic transcript of proceedings had in the above-entitled matter before the Honorable Ronald Walker, United States Referee in Bankruptcy, at 340 Federal Building, Los Angeles 12, California, on Tuesday, June 18, 1957, at the 10:00 o'clock a.m. session.

Appearances of Counsel:

For the Bankrupt:

LAWRENCE RITTENBAND, ESQ.

For the Petitioning Creditors:

WILLIAM J. TIERNAN, ESQ. [31]

* * *

Tuesday, June 18, 1957, 10:00 A.M.

The Referee: You may proceed, gentlemen.

Mr. Rittenband: I understand that Mr. Tiernan, who is the attorney for petitioning creditors, is not here.

Mr. Werner: He told me to——

The Referee: You are talking about the Mason matter? I have two matters on the calendar.

Mr. Werner: I am Mr. Werner, your Honor, and Mr. Tiernan is next door, but he told me to proceed with the examination of the witness.

The Referee: I think we will have to hear the

motion to set aside the order of adjudication first. If the order of adjudication is vacated, there will be no foundation for a 21-A examination, so I guess there is nothing we can do but to wait for Mr. Tiernan.

Mr. Werner: He is next door.

The Referee: We will take an informal recess and wait for Mr. Tiernan.

(Recess taken.)

The Referee: Mr. Tiernan, you may proceed.

Mr. Tiernan: If the Court please, I am going to defer this morning to—— [2*]

Mr. Werner: The Court wants to hear the argument on the motion first. I have informed the Court that I am prepared to proceed on the examination.

The Referee: It seems to me, Mr. Tiernan, that we will have to hear the motion to vacate the adjudication first. Otherwise, there is no foundation for the other two items that are on the calendar.

Mr. Tiernan: Irrespective of the status of the adjudication, we have an unquestioned right to the examination of Mrs. Mason, whether he is adjudicated or not.

The Referee: I suppose so, yes.

Mr. Tiernan: We have a right to examine under the rules, to take depositions or to examine under Section 21 of the Bankruptcy Act.

The Referee: Are you prepared to proceed on it?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Tiernan: On the motion, your Honor?

The Referee: Yes. I will hear that matter first. I guess you have the laboring oar on that.

I was talking about it with Referee Calverley, and he mentioned a letter which had passed between you two attorneys.

Mr. Tiernan: Yes.

Mr. Rittenband: I have the original of the letter here. If I may approach the bench——

The Referee: Do you want to introduce it? [3]

Mr. Rittenband: Yes.

The Referee: All right. I will hear from you.

Mr. Rittenband: I should like to first give to your Honor a little bit of the background chronologically as to this matter. It may furnish the framework for the motion which I am about to make.

The petition in involuntary bankruptcy was originally filed, I think, sometime in January. The alleged bankrupt then retained me. I have never had an occasion of meeting Mr. Tiernan, although we have mutual friends and we both come from back East. I had the pleasure of hearing about him and knowing about him.

I got in touch with Mr. Tiernan and at the beginning, our relationships were formal with respect to this matter. He very kindly consented to extend the time for me in which to plead in respect to the petition, and a formal stipulation was entered into and it was signed by Referee Head.

Now, on or about January—sometime in January, I made a motion to dismiss the petition on the grounds which are set forth in our notice of motion

and they are now before your Honor. That notice of motion was granted. It was granted particularly on the grounds that the alleged acts of bankruptcy, at least as they alleged them, were not acts of bankruptcy, and there were two petitioning creditors instead of three. [4]

The petitioning creditors had 20 days to file an amended petition.

I think that order, or that motion was granted on January 28, and dismissed, so that would be sometime in the middle of February, which would be the time for the amended petition to be filed.

The Referee: The amended petition was filed on March 11.

Mr. Rittenband: That is correct. I think the motion was granted on January 28. I just point it out to indicate that there had not been this strict adherence to the days that they have to file an amended petition or that we have to file an answer to that amended petition, and on the telephone I called Mr. Tiernan on one or two occasions and said to him that I had not yet received his amended petition and the time had expired. He asked me my indulgence. I granted him that request, to take as long as he liked.

Then, on March—I think it was about March 11, the amended petition was filed.

Now, without a formal stipulation, which we had previously had, I asked Mr. Tiernan again on the telephone to extend my time to move with respect to the petition, and under date of March 15, 1957, I wrote to Mr. Tiernan, and I told him I had been

on trial in the Superior Court all week and I would be similarly [5] occupied and unless I heard from him to the contrary, I would assume it would be agreeable to move with respect to the petition in this matter by April 1, 1957.

I received no answer from Mr. Tiernan, so I assumed that that was satisfactory.

Then, on or about April 1, I prepared and filed—maybe the next day—

The Referee: April 2, motion to dismiss.

Mr. Rittenband: That is correct. I filed a Motion to Dismiss the Amended Petition.

It came on for argument before Referee Head and he decided that the amended petition—there were only two acts of bankruptcy alleged. The first act of bankruptcy was that the alleged bankrupt was supposed to have lied in testimony which he gave before a Commissioner in the Superior Court on a supplementary proceedings, which constituted concealment within a four-month period of his interest which he had in certain property belonging to his wife.

The second ground was, namely, that there had been a preference shown by the alleged bankrupt in paying \$300 a month under a Court order in a corporate securities act violation.

The Referee: That has already been ruled upon.

Mr. Rittenband: That has already been ruled upon. That had been decided by Judge Head. [6]

Mr. Tiernan and I went outside and we talked as we had in the past on the possibility of effecting a settlement in this matter.

Mrs. Mason has considerable property and considerable interest in some oil fields in Utah, and it was suggested by Mr. Tiernan that if we can work out some kind of a settlement we would obviate the necessity of going through in bankruptcy. I told him we would be very much interested in doing so and I would talk to Mrs. Mason and see what could be arranged.

Now, I then had 20 days within which to file an amended answer to the amended petition.

The Referee: Your time would have run about the 4th or 5th of May.

Mr. Rittenband: I think it would have been about the 5th of May, that is correct. The 5th of May or the 6th of May.

The Referee: Notice was sent to you on April 23——

Mr. Rittenband: That is correct.

The Referee: ——that the Court had ruled on the 16th.

Mr. Rittenband: So that would be about May 8 or 9.

Mr. Tiernan: No.

Mr. Rittenband: More than that.

Mr. Tiernan: It would be later than that. It [7] is 20 days, your Honor.

The Referee: It depends on whether your time is going to run from the service of the notice of ruling or from the ruling itself.

Mr. Rittenband: Yes, but in any event it is around May 5 or 8.

During this time, I had communicated with—or

in the interim period, I communicated with Mr. Tiernan. I called him up about May 12. Mr. Mason and Mrs. Mason were then in Utah where these wells were located. When they came back, I discussed the matter with them.

On May 12, I called Mr. Tiernan and I told him that I had been told by my clients that Mrs. Mason would be willing to offer some of her stock in the M.G.M. Petroleum Company in payment of all of the obligations which were owing by Mr. Mason, particularly to these petitioning creditors, and he told me that that might be all right.

Then, he wrote me on May 14, 1957, the letter which your Honor has perused.

The Referee: I suggest that you read the whole letter.

Mr. Rittenband: Fine. I would like to preface this by saying that we were already in default and it was known by Mr. Tiernan that we were in default. We [8] had an implied understanding pending these negotiations. He knew we were in default and impliedly permitted the default until we exhausted our negotiations.

The letter reads:

“The proposal that you discussed with me concerning the M.G.M. Petroleum Co., Inc., is definitely of interest to my clients. Before further consideration may be given to this, we need to have the balance sheet and operating statement of the company as well as a description of its capital structure.

“If this is agreeable, please return these docu-

ments, together with a precise offer, and I will take it up with my clients.

“In the meantime, please file your answer to the amended petition, and please advise me of an agreeable date for the production of Mrs. Mason, or I will assume that you prefer to have me subpoena her for her examination.

“Very truly yours,

“WILLIAM J. TIERNAN.”

I received that letter on May 15, and on May 15, 1957, I wrote to the Masons and said,

“I enclose herewith a letter from Bill Tiernan. If you have any of the information requested, please forward it to me immediately.”

Mr. and Mrs. Mason were still in Utah, and [9] they came back a few days later.

In the meantime, after receiving the letter of May 14, 1957, according to my diary, I was on trial in the Superior Court, which took a few days.

After that trial was concluded, I prepared a draft of the answer. Mr. Mason was still not back to sign the answer.

While I was in the act of preparing the answer, I then received notice of the adjudication by default and also without any previous warning or notice from Mr. Tiernan that that was going to be done or giving me an opportunity——

The Referee: I don't find that in the file here.

Mr. Rittenband: If I may approach the bench, it was dated May 27, 1957—May 20, 1957, which was only five days after the receipt of the letter.

The Referee: I don't know why that does not appear here, but I just haven't found it.

Well, apparently, there has been a mistake made in this file.

Mr. Rittenband: Now, if it please the Court, I don't unfortunately practice bankruptcy law, specially or otherwise. Maybe this is the second matter I have ever had.

My impression is that these adjudications are not self-executed; that some effort must be made by counsel [10] in order to procure an adjudication, particularly in a bankruptcy matter, if the clerk's office does not do that.

If I am wrong, I would like to apologize to Mr. Tiernan. It would seem to me that it must have been as a result of some request made by Mr. Tiernan that this adjudication in bankruptcy, or adjudication was made.

I think on the basis of the foregoing facts, which are adequately documented, that if there was any fault it was my fault and if it was a fault, it was an excusable neglect on my part.

It was never our intention, and Mr. Tiernan knew that, to permit an adjudication by default to be entered in view of the fact that I had strenuously resisted the two petitions that had been filed on the ground that they do not, as a matter of law, constitute acts of bankruptcy.

The Court did agree with me in the first instance. In the second instance, one of the grounds had been sustained.

Now, it was known by the attorney for the peti-

tioning creditors that we intended to resist this bankruptcy right through, or failing an amicable adjustment and settlement of the matter, by payment by Mrs. Mason with the M.G.M. stock. [11]

At the time we entered into negotiations the 20-day period had expired and I had previously myself given oral notice to counsel that the 20 days that he had to file his amended petition had expired and asked him what he wanted to do, and he stated that he desired additional time, which he was given.

When I received this letter of May 14, 1957, which was after the 20-day period in which I had to file an answer to the amended petition, we had these negotiations and when I received the letter on May 15, I proceeded immediately thereafter to write to my client to get the information requested.

At the same time, after I got through with the case I had in court, I prepared a draft of the answer to the amended petition.

I feel that in view of all of those facts, if it please the Court, and in view of the liberal rule that we should have our day in court and be permitted to file a responsive pleading, we are entitled to have our motion to vacate the adjudication granted.

Now, with respect to the law——

The Referee: To what?

Mr. Rittenband: ——to the law, counsel contends in his memorandum that the Referee has no power to set aside an adjudication and cites Remington on Bankruptcy, but that contention I very seriously disagree with. [12]

On the contrary, I think both under the Bank-

ruptcy Act, General Orders and the decisions, the Referee has plenary power to do so over its own decrees and over its own orders.

As your Honor knows, under the 1938 amendment to the Bankruptcy Act, Section 39 provides with respect to the jurisdiction and powers of Referees that:

“Referees are hereby invested,” says the Act, “subject always to a review by the Judge, with jurisdiction to (1) consider all petitions referred to them and make the adjudications and dismiss the petitions; * * * (6) perform such of the duties as are by this Act conferred upon courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided.”

There is nothing in the Bankruptcy Act which says that a Referee, once having made an adjudication, loses power or jurisdiction over it, so that consequently, we have got to go to other authorities for the purpose of determining whether or not your Honor, as a Referee in a court of bankruptcy and acting as a court of bankruptcy, has the power over your own decree.

Generally speaking, the rule is in all courts and all jurisdictions that if the court has a power to make [13] a decree, it has a power to amend the decree.

I should like to read to your Honor the language of the various authorities to which I have adverted

in my memorandum. I will at this time also advert to the statements made.

I now cite from Collier on Bankruptcy that:

“A motion or petition to vacate an adjudication of bankruptcy is not a collateral but a direct attack. It is directed to the Court which rendered the adjudication to reconsider its decree because of some equitable ground or jurisdictional defect. This self-corrective device is nowhere expressly authorized by the Act or the General Orders; it is a power inherent in a court of authority.”

Then, also, the rule with respect to the vacating of this decree:

“The rule should be liberally construed in granting a motion to set aside a default judgment in order that the case may be tried under its merits.”

These are all citations to support those quotations from Collier.

The question is whether or not a motion to set aside a default judgment also applies in bankruptcy, particularly with respect to an adjudication, and there are several cases which are cited in my memorandum to the [14] effect that a motion of this kind covers bankruptcy proceedings except insofar as they are inconsistent with the Bankruptcy Act or the General Orders.

There is nothing inconsistent in the Bankruptcy Act or in the General Orders with the power and the right of a court of equity—I mean, a court of bankruptcy, and your Honor acts as a court of bankruptcy, in setting aside its own decree upon

some equitable ground or on some grounds which may be persuasive.

Now, then, if it please the Court, I should like to read very apposite language from Collier where this entire question is thoroughly reviewed and all the cases discussed:

“Although there has been considerable authority that a Referee, once having made an order, has no power to reconsider to amend or vacate it, the better view seems to be that a Referee, as a Court, has such power. In a well-reasoned decision, Circuit Judge Learned Hand considered and discussed all the authorities then extant on the problem and concluded that the Referee had the same power as any other court to reconsider and amend his orders, despite the fact that such orders are reviewable by the District Judge.”

The Referee: You are referring to the Pot-tasch [15] Bros. Co., Inc., case?

Mr. Rittenband: Yes. Then, in a supplement to this case, the question has been decided by the United States Supreme Court, *Pfister vs. Northern Illinois Finance Corp.*, 317 U.S. 144, which involves the power of a Referee, I think, to review a petition for review, as a matter of fact, or amend a petition for review and an order of review, which it itself had previously entered.

The Court said it had the power to do so; at least, the authors of *Colliers* so state.

The question is now laid to rest and established law that a Referee has the power to vacate an adjudication made by him. If he has that power, he

has the power also to review an adjudication, since there is no express power in the Bankruptcy Act or in the General Orders giving a Referee the power to review a judgment or decree which he had previously made.

The Referee: I am troubled by the fact that Mr. Tiernan's letter stated that you should go ahead and file your answer.

Mr. Rittenband: Yes, but I needed reasonable time in which to do it, certainly, when I was in the trial in the Superior Court. I was then in the process of drafting this answer and waiting for the Masons to return. They were in Utah where they spend most of their time at these wells which are owned by Mrs. Mason. [16]

The Referee: I am more troubled by the fact that the rule in the Federal Court is tighter than it is in State Courts regarding extensions, even to the extent that sometimes it is ineffective until endorsed by the Court.

Mr. Rittenband: That is correct, your Honor.

The Referee: It seems to me very probable that this order of adjudication was not made at the suggestion of Mr. Tiernan but by the Court itself after the time had elapsed. I may be wrong in that.

Mr. Tiernan: That happens to be the exact situation.

Mr. Rittenband: As I said, I didn't know whether it was self-executing or not.

If it is self-executing, then, the order dismissing the petition after the 20 days expired when the

petitioning creditors had within which to file their amended petition and it hadn't been done——

The Referee: It may be discretionary on the part of the Court to vacate the adjudication, but my point is that the onus, the burden, is on the attorney to comply with the rules of the Court, despite agreement with other attorneys.

Mr. Rittenband: There is no question about that. I was addressing my remarks to your Honor's discretion. If your Honor has the power, which your Honor has, to [17] set aside a default adjudication, then—well, it was a *fait accompli*. We would not have obtained an order of the Court or an order approving the stipulation extending the time. That is the reason why we are before your Honor.

The question is whether or not under the facts as I have outlined them to your Honor, there is a sufficient equitable ground so your Honor may exercise your discretion in setting aside this adjudication, giving us our day in Court.

The Referee: The equitable ground is a misunderstanding on your part. You were busy on another matter; you relied on past, relaxed attitude.

Mr. Rittenband: That is exactly it.

The Referee: That is the sum total of it.

Mr. Rittenband: We were in default on May 14 when this letter was sent.

On May 15, it was received by me. On the 15th, I couldn't have filed it that day. It has got to be prepared, and with the other matters in the office and the client away, and without being able to verify it——

The Referee: What was the date of adjudication?

Mr. Rittenband: June 20. There was only a period of days which elapsed from which I received the letter.

The Referee: From the time you received the letter, but you had considerably more time since you had the duty [18] of filing it. You had time to do it.

Mr. Rittenband: We had been in negotiations at that time. There wouldn't be any necessity——

The Referee: It was negotiation which the Court had no knowledge of, and apparently, had not been advised of.

Mr. Rittenband: That is true. There is no question that time had expired and that if I was remiss, it is the same sort of remissness that lawyers generally do practice in the Superior Courts and State Courts, and I did not know, because of the fact, as I told your Honor, that I do not practice regularly before the Bankruptcy Court, and it is a lack that I deplore because I think it is extremely interesting—I had assumed, as I do with other lawyers in other matters handled by me for 28 years that——

The Referee: I don't think you have any complaint about Mr. Tiernan here, because this was something the Court would do automatically.

Mr. Rittenband: I have no complaint about him, if it please the Court.

The Referee: There is a complete lack of any showing for request for extension by you.

Now, possibly, the facts you have mentioned will

excuse your lack of meeting that duty, but as far as reliance upon some understanding or lack of understand or tacit understanding with Mr. Tiernan, I don't think [19] that is really involved here.

Mr. Rittenband: Well, then, what I am doing, if it please the Court, is appealing to the Court, assuming even that any implied or implicit or tacit understanding which I had with Mr. Tiernan would not govern, or that there may be some misunderstanding on my part and not on his, and I will ask your Honor's indulgence to permit us to file an answer.

The Referee: Have you filed your proposed answer?

Mr. Rittenband: Yes.

The Referee: I will hear from Mr. Tiernan.

Mr. Tiernan: I am willing to concede that Mr. Rittenband's point concerning the authority of the Court to review and amend—that includes the Court, the Referee—its order as good law.

However, I am still confronted by the authorities and the rulings which are embodied in the points and authorities and which as I think is pretty clearly laid out in Remington's treatise concerning a vacation of an order of adjudication which stands in a special or unique position from the other orders regularly made in the course of the administration of the estate by the Referee.

The Referee: I have had a chance only to glance at these while Mr. Rittenband was talking, but it did occur to me that possibly the powers have been

broadened [20] somewhat since the authorities cited in Remington.

I am far from an authority on the whole history of the Bankruptcy Act, but this case that you cite of Shapiro Holding Corporation is reported in 8 American Bankruptcy Reports, New Series. There is no date——

Mr. Tiernan: Yes.

The Referee: ——but from the volume number, it would be quite old.

Mr. Tiernan: It is a fairly old case. There are cases after the 1938 amendment, however, your Honor, and so far as I can see, they are still good law.

The Referee: That is a matter I will have to determine after I study the authorities. If you will address your remarks to the proper exercise of discretion of the Court——

Mr. Tiernan: Very well.

The Referee: ——assuming I will have jurisdiction, I will appreciate it.

Mr. Tiernan: To begin with, Mr. Rittenband outlined some of the previous history of the pleading stages of this case and the fact that the petitioning creditors had failed to file an amended petition and that Mr. Rittenband had not pressed the point and so forth.

Well, of course, where the ruling on the first petition was concerned, no notice of the ruling had been given by Mr. Rittenband, and, hence, the time did not [21] begin to run until notice of the ruling under the Federal rules.

As to the filing of the answer to the amended petition which was the motion filed by Mr. Rittenband, we did not ever have and I don't think it is contended that we had any understanding that the time would be extended, and, of course, the Court made the adjudication when the answer was not filed.

We had—Mr. Rittenband and I had no conversation concerning negotiations for settlement. I think it would be a little unfair to put the thing in that atmosphere. We had no conversation except one, and that was on the way back from Court at the time of the hearing on the motion to dismiss the amended petition, which was then, of course, denied by Referee Head, and we rode back to the office together and it was at that time only that he discussed this possibility of settlement with me.

When I didn't hear from him a week or ten days later, I wrote him this letter of May 14, because I was afraid the very thing would happen and that he would conclude from the fact that we had discussed a proposal of settlement that he was excused from filing an answer.

This case has been dragging on for some time and I did not want Mr. Rittenband to assume that we were going to permit any delay in this case, because we didn't want any delay. [22]

The Referee: You would have some difficulty, it seems to me, in settling this matter between your your petitioning creditors and the bankrupt anyway——

Mr. Tiernan: Yes.

The Referee: —to the exclusion of other creditors.

Mr. Tiernan: It couldn't be done.

The Referee: It would be in violation of Section 152 of Title 18.

Mr. Tirenán: That is right. It couldn't be settled, or settled without the knowledge of the Court. We had nothing in the way of any offer or anything.

It was just—well, I could tell you the substance of the conversation.

Mr. Rittenband said, "Would you be interested in some of Mrs. Mason's stock in M.G.M.?"

I said, "Yes, we would be willing to discuss it," and this letter followed setting forth some of the requirements we would need to undertake even the initial negotiations, but I know, as a matter of law, that this proceeding could not be effected certainly without notice of any proposal of that type to all the other creditors.

There is one other thing that I think should be discussed in this matter: Assuming we get past the original jurisdictional point, the question is whether or not Mr. Mason has a valid defense to the petition and whether he can in good faith assert a defense, or is this [23] simply a means of delaying these proceedings?

The Referee: Let me ask a question to show you my own ignorance of this:

Mr. Rittenband has been referring to Mrs. Mason. This name "Monte G. Mason" could either be male or female.

Is it Mr. Mason who is in bankruptcy?

Mr. Rittenband: Yes, it is Mr. Mason who is in bankruptcy.

Mr. Tiernan: Mr. Mason, that is correct.

The Referee: Very well.

Mr. Tiernan: We don't feel that Mr. Mason has a valid defense to this proceeding that may be asserted here or anywhere else. He has been examined at length in supplementary proceedings. He has no property and no assets that we know of.

The claims of the creditors are all solidified by judgments. I think the only grounds Mr. Rittenband has for defense is a technical ground as to whether or not the making of payments to the probation officer or the concealing of property at a supplementary examination constitutes bankruptcy.

That has already been passed upon by Referee Head. I think those are matters that I think only serve to prolong these proceedings.

Now, Mr. Rittenband filed his affidavit in [24] these proceedings, which is the basis, I believe, under the rules, for his motion which is before the Court today.

Now, I see nothing in this affidavit except the legal conclusion that there was inadvertence or some sort of negligence. I don't think it could be termed inadvertence because there is nothing in the affidavit that sets forth anything in the nature of an inadvertence.

The Referee: Thus far, the only thing that appeals to me in Mr. Rittenband's argument is his lack

of familiarity with the Federal Court's strictness in enforcing compliance with the rules.

Mr. Tiernan: Well, it may be. Mr. Rittenband is a lawyer of some years' standing before the Bar, and I don't know what experience he has had, but I think the standards in the Federal Courts are probably not as strict as the ones in the Superior Court.

There are all kinds of liberalities allowed under the Federal rules.

However, once an order of the Court has been made and a motion is directed under Rule 60 of the Federal Rules to vacate that motion, it becomes incumbent upon the lawyer, if it be, or his client, to make a proper showing so as to cause the vacation of that order.

I don't think certainly this affidavit contains anything in the nature of a fact which shows inadvertence or anything except possibly inexcusable neglect, and if [25] Mr. Rittenband wants to file additional affidavits, I won't deprive him of that opportunity.

The Referee: Oh, I think the matter has been pretty well exhausted. I will have to examine these authorities anyway.

I will mark the motion to set aside the order of adjudication submitted.

(Whereupon the hearing on the motion to set aside the order of adjudication was concluded.) [26]

Reporter's Certificate

I, Yoshiye Yamada, official court reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 26, inclusive, constitute a true and correct transcript of the proceedings had in the above-entitled matter on Tuesday, June 18, 1957, at the 10:00 o'clock a.m. session.

Dated this 30th day of July, 1957.

/s/ YOSHIYE YAMADA.

[Endorsed]: Filed August 5, 1957.

[Title of District Court and Cause.]

ORDER RE MOTION TO SET ASIDE
ADJUDICATION

This matter came on regularly to be heard before the undersigned Referee in Bankruptcy in his courtroom in the Federal Bulding, Temple and Spring Streets, Los Angeles, California, on the eighteenth day of June, 1957, at the hour of ten o'clock, a.m., upon the Notice of Motion to Set Aside Adjudication of Bankruptcy and Order to File Schedules filed in these proceedings by the bankrupt, Monte G. Mason and upon the affidavit of Laurence J. Rittenband and upon the counter-affidavit of William J. Tiernan in objection to said motion and upon the Points and Authorities filed by William J. Tiernan, Attorney for Petitioning Creditors, and those filed by Laurence J. Rittenband.

The moving party, Monte G. Mason, appeared through his attorney, Laurence J. Rittenband, the petitioning creditors appeared through their attorney, William J. Tiernan.

The Court having heard argument of counsel and having examined the affidavits on file, as well as the points and authorities, and the Court being of the opinion that the affidavit of Laurence J. Rittenband is insufficient to justify setting aside the Order of [32*] Adjudication heretofore entered and that the moving party has not shown sufficient or adequate grounds for setting aside the order and it further appearing that the bankrupt and his attorney have neglected to file an answer to the Amended Petition in Involuntary Bankruptcy within the time fixed by law and insufficient excuse being shown, good cause appearing:

It Is Ordered that the motion to set aside adjudication of bankruptcy and order to file schedules be and the same hereby is denied.

It Is Further Ordered that the bankrupt, Monte G. Mason, file schedules of his assets and liabilities as well as a statement of his affairs in these proceedings on or before July 2, 1957.

Dated: June 26, 1957.

/s/ RONALD WALKER,
Referee in Bankruptcy.

Received June 25, 1957.

[Endorsed]: Filed June 25, 1957. [33]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The undersigned Monte G. Mason, also known as M. G. Mason, individually and as alleged bankrupt, and Jeanne R. Mason, hereby substitute William Strong as their attorney of record in the above-entitled matter in the place and stead of Laurence J. Rittenband.

Dated: This 28th day of June, 1957.

/s/ MONTE G. MASON,
Individually, and as Alleged
Bankrupt.

/s/ JEANNE R. MASON.

I hereby consent to the above substitution.

Dated: This 2nd day of July, 1957.

/s/ LAURENCE J. RITTENBAND.

The above substitution is hereby accepted.

Dated: This 28th day of June, 1957.

/s/ WILLIAM STRONG.

[Endorsed]: Filed July 2, 1957. [34]

[Title of District Court and Cause.]

PETITION TO REVIEW

To Honorable Ronald L. Walker, Referee in Bankruptcy:

The Petition of Monte G. Mason, respectfully represents:

(1) That your petitioner is the alleged bankrupt herein;

(2) That on the 26th day of June, 1957, an order was made by the referee herein, and filed in this Court, a copy whereof is hereto annexed, marked Exhibit "A," and made a part hereof;

(3) That your petitioner is aggrieved by said order, and prays for a review thereof and complains that the Court committed error in making said order in the following particulars:

(a) That in and by said order, the Court denied to petitioner the opportunity to file an answer to the petition herein and to a trial by jury as to the issue of petitioner's alleged commission of an act of bankruptcy;

(b) That in and by said order, the Court denied petitioner's motion to set aside adjudication of bankruptcy and order to file schedules herein;

(c) That in and by said order, the Court in effect reaffirmed its prior erroneous adjudication of bankruptcy despite the fact [35] that none of the alleged acts of bankruptcy set forth in the amended

petition herein in involuntary bankruptcy, constitute acts of bankruptcy or an act of bankruptcy; and despite the fact that petitioner herein, through no fault of his own, but solely because of the failure of his prior counsel to file an answer as instructed by petitioner, is being deprived, in this Court of Equity, of a jury trial, as the law accords to him, upon allegations in the amended petition charging your petitioner with perjury before the Superior Court of the State of California;

(d) That in and by said order, the Court adjudicated petitioner a bankrupt, whereas petitioner does not desire to rid himself of any of his existing obligations by the process of bankruptcy, but desires and intends to pay to each of his creditors the full amount owed legitimately to each, as soon as possible.

Wherefore, petitioner prays that said Order be reviewed by a Judge of this Court, and that the Referee promptly prepare and transmit to the clerk thereof his certificate thereon, together with a statement of the questions presented, and all the records, papers and files in this case.

Dated: July 3, 1957.

/s/ WILLIAM STRONG,
Attorney for Petitioner.

EXHIBIT "A"

Identical to Order Re Motion to Set Aside Adjudication, see pages 49 and 50 of this printed record.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 8, 1957. [36]

[Title of District Court and Cause.]

SUPPLEMENTAL PETITION FOR REVIEW
OF ADJUDICATION OF INVOLUNTARY
BANKRUPTCY

To Honorable Ronald L. Walker, Referee in Bankruptcy:

The Petition of Monte G. Mason, respectfully represents:

(1) That you petitioner is the alleged bankrupt herein;

(2) That on the 26th day of May, 1957, the petitioner herein was adjudicated a bankrupt.

(3) That your petitioner is aggrieved by said adjudication and prays for a review thereof and complains that the Court committed error in making said adjudication in the following particulars:

(a) That in and by said adjudication on said date, petitioner was denied the opportunity to file an answer to the petition herein and to a trial by jury as to the issue of petitioner's alleged commission of an act of bankruptcy;

(b) That said adjudication is based upon alleged acts of bankruptcy set forth in the amended petition herein in involuntary bankruptcy, which do not in law and/or in fact constitute acts of bankruptcy or an act of bankruptcy;

(c) That petitioner does not desire to be adjudged a bankrupt or to rid himself of any of his existing obligations by the process of bankruptcy but desires and intends to pay to each of his creditors the full amount owed legitimately as soon as possible.

Wherefore, petitioner prays that said adjudication be reviewed by a Judge of this Court, and that the Referee promptly prepare and transmit to the clerk thereof his certificate thereon, together with a statement of the questions presented, and all the records, papers and files in this case.

Dated: July 23, 1957.

/s/ WILLIAM STRONG,

Attorney for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 24, 1957. [40]

[Title of District Court and Cause.]

ORDER ON MOTION RE SCHEDULES

This matter came on to be heard before the undersigned, Referee in Bankruptcy, at his courtroom in the Federal Building, Temple and Spring Streets, Los Angeles, California, on the 30th day of July, 1957, at the hour of 10:00 a.m. Mr. William Strong appeared for the bankrupt. William J. Tier-

nan appeared for the petitioning creditors and moving parties.

Motion having been made for an order directing the bankrupt to file schedules in these proceedings and the court having heard argument of counsel, good cause appearing;

It Is Ordered that Monte G. Mason file in these proceedings, on or before August 20, 1957, a schedule of his assets and liabilities as well as a statement of his affairs in the manner and in the form approved by the Supreme Court of the United States.

It Is Further Ordered that the previous order of this Court deferring the time of the bankrupt to file schedules until after hearing on a petition for review be and the same hereby is vacated.

Dated: July 30, 1957.

/s/ RONALD WALKER,
Referee in Bankruptcy.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 30, 1957. [42]

In the District Court of the United States
Southern District of California, Central Division
In Bankruptcy No. 76,001-WM

In the Matter of:
MONTE G. MASON,

Bankrupt.

Before: Honorable David B. Head, Referee in
Bankruptcy

Heard by: Honorable Ronald Walker, Referee in
Bankruptcy

HEARING RE: 1. EXAMINATION UNDER 21-
A. 2. HEARING ON MOTION TO DISMISS

The following is a stenographic transcript of proceedings had in the above entitled matter on Tuesday, July 30, 1957, before the Honorable Ronald Walker, United States Referee in Bankruptcy, at his courtroom, Federal Building, Los Angeles, California.

Appearances of Counsel:

For the Bankrupt:

WILLIAM STRONG, ESQ.

For the Petitioning Creditors:

WILLIAM J. TIERNAN, ESQ.

Tuesday, July 30, 1957, 10:00 A.M.

The Referee: I will call the matter of Monte G. Mason.

Mr. Strong, are you here in the Mason matter?

Mr. Strong: Yes, your Honor. I have an answering affidavit.

The Referee: This is in the Mason matter?

Mr. Strong: Yes, sir.

The Referee: Where do we stand in this matter?

Mr. Strong: I have a couple of answering affidavits, but I can't find the originals. They have just

disappeared. Would you mind looking at the copies until I get the originals, your Honor?

The Referee: Maybe I should see what you are answering.

Mr. Tiernan; I think it is a very simple matter today.

The Referee: Mr. Tiernan, you are relying on the affidavit of Mr. Werner?

Mr. Tiernan; The only thing we seek today is a modification of the order of the Court——

The Referee: ——permitting a further 21-A examination.

Mr. Tiernan: I understand that examination is [2*] already scheduled for sometime in September. I simply wanted to advance the date and to require the bankrupt to file his schedule of assets and liabilities, as well as a statement of affairs without waiting for any outcome of any review or appeal.

That matter conceivably could be delayed almost indefinitely.

The Referee: Well, it is true it could, but if the matter of adjudication, or an ultimate ruling on the adjudication is in doubt, I am in some doubt as to whether he should not be required to file schedules. However, I am approaching it with an open mind.

I would be glad to hear argument on it.

Mr. Tiernan: The situation is this: It would seem to me, your Honor——

The Referee: Mr. Tiernan, may I run through these affidavits?

Mr. Tiernan: Please, of course.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Referee: Then, we will know what we are talking about.

Mr. Strong: Mr. Tiernan, will you indicate that I gave you copies of the affidavits?

Mr. Tiernan: I acknowledge receipt of those this morning.

The Referee: Very well. Mr. Tiernan, I will hear from you. [3]

Mr. Tiernan: I want to first argue the question of the filing of the schedules and statement of affairs in this proceeding.

I think it would be a serious situation if the Bankruptcy Court, as well as the creditors of a bankrupt, would have to wait in each case pending an outcome of a review or a possible appeal from an order of adjudication before they could get a look at the assets and liabilities of a man who had been adjudged a bankrupt.

In addition to the rather serious practical problems presented by the situation, I think that Section 7-a-(7) of the Bankruptcy Act imposes an obligation upon a bankrupt within five days after adjudication to file these schedules and statement of affairs.

I don't dispute the authority of the Court to extend such a time for reasonable cause, but I think it is the duty of the bankrupt and I think that the creditors are entitled to it.

Theoretically, this matter could be delayed for several years, and, as a matter of fact, it already has been delayed for sometime through the activities of counsel here.

Now, the order of the Court is presumptively valid. It is a judgment. It is entitled to the same status and standing as any other judgment and it is not [4] automatically stayed or execution thereof deferred, because counsel wishes to take a review.

With respect to the examination of Mrs. Mason, the only thought I had in mind was advancing the date. My understanding was that the examination date had been continued to September, and I am frank to say that I wanted an earlier date for her examination. She has already been ordered by the Court to appear.

The Referee: What was the date?

Mr. Tiernan: September 5 or 6.

The Referee: In setting that date, I was influenced by my calendar and the fact that I expected to be away for a couple of weeks.

Mr. Tiernan: I recall that my transmission broke down that morning, and it delayed me in getting to court. If that was the situation——

The Referee: That was about the earliest date, according to my own calendar. Actually, Referee Head may be back in September and he may want to continue the matter on his calendar. I don't know what the situation will be here. He is now planning to come back around the first of September.

Mr. Tiernan: If that is the situation, the examination date of Mrs. Mason may remain a September date.

As far as the filing of schedules, we would like to have those on file sometime between now and

that [5] September date. That is the purpose of the motion today.

The Referee: Mr. Strong, what have you to say about filing schedules? I granted your motion previously. I would have to vacate that order and make a new order requiring the filing.

Mr. Strong: There doesn't seem to be any useful purpose served in filing schedules, as Mr. Werner wishes to use them for a purpose of his own.

The Referee: Let's leave Mr. Werner out of this. There has been too much of personalities in this.

Mr. Strong: It is his affidavit.

The Referee: I realize it is his affidavit, but there is too much about personalities, because there are a large number of other creditors.

Mr. Strong: Nobody has come forth and made any statements or complaints. It is only Mr. Werner. It is always Mr. Werner.

If your Honor will recall, the purported acts of bankruptcy are acts brought about by Mr. Werner. In a sense, he is the one who brought the supplementary proceedings. Now, he claims the testimony therein is false and that falsity constitutes an act of bankruptcy, the falsity in itself.

The Referee: It was that question which Referee Head ruled on as being an act of bankruptcy.

Mr. Strong: Yes, sir, but basically, addressing [6] myself to the question of filing of schedules, I don't quite see that any purpose would be served at this time in requiring Mr. Mason to file any schedules, if it turns out that the acts of bankruptcy

are not sufficient, and that consequently, the petition and the adjudication should not have been granted.

The Referee: That was my original view of it, but I have been thinking about this matter subsequently and I wonder how it would prejudice Mr. Mason if he were required to file schedules.

Mr. Strong: It is simply, in my opinion, an act which would be of no use to perform if there was no bankruptcy ultimately.

The Referee: True, but if he were adjudged a bankrupt, assuming that the appellate court would throw out the adjudication matter, would it prejudice Mr. Mason?

Mr. Strong: I don't know whether it would prejudice him any. What would be the useful function for the Court or Creditors?

The Referee: I am putting it in reverse. Suppose it is a useful act.

Mr. Strong: Why should the Court require the act—you are putting me on the spot by saying to me: How is this going to hurt you?

I don't understand that a person is required to do things simply because it isn't going to hurt him or [7] is going to hurt him to do it.

The Referee: True, but it will certainly influence the Court's ruling, if it would operate to the bankrupt's prejudice before the matter were finally decided.

There are so few provisions for stays pending reviews of a bankruptcy ruling or ruling of a Bankruptcy Court.

Mr. Strong: May I ask: How does it prejudice the creditors or anybody else if he does not file them? Just what harm is there in the mere filing of the bankruptcy schedules?

The Referee: You are very adroit at answering a question with another question. I take it you can't show how Mr. Mason would be prejudiced.

I will ask Mr. Tiernan whether the creditors would be prejudiced.

Mr. Strong: I will state flatly that I can't see how Mr. Mason can be prejudiced by the mere act of filing a schedule. Obviously, in a schedule, he is required by law to state the truth. That is all he is going to state, so from that standpoint, there cannot be a direct prejudice to him now, but also, I don't see the requirement that he file a schedule unless he is actually a bankrupt and that is the very question that we are challenging here.

I can see something else, that by requiring us to file a schedule here, the creditors are not just [8] interested in the schedules. They are obviously interested in the second step that follows the filing of the schedule. As Mr. Werner has already hinted in his affidavit, by the filing of the schedules, he wants the foundation laid. Then, he can ask for ancillary or whatever type of proceedings he wants in another state.

The minute we file a schedule you are going to have motions to take further steps to which the schedules are a foundation.

The Referee: I think there is no doubt of that.

It may be that creditors are entitled to those schedules for the exact purpose of making such motions.

What is your position, Mr. Tiernan? Are the creditors going to be hurt if he does not file schedules?

I will reverse the question I posed to Mr. Strong.

Mr. Tiernan: Yes, your Honor, for the very reasons that are suggested in Mr. Werner's affidavit.

Let me answer Mr. Strong, if I may, point by point.

In the first place, there are three petitioning creditors. It happens that Mr. Werner is convenient for the execution of affidavits. There are other creditors, and I assure the Court that they are vitally interested in this matter, and with whom I have discussed the case [9] only this morning. One of them also has a judgment for some \$45,000.

Now, the second point: The purpose of the filing of schedules is, as Mr. Strong suggests, for further and additional steps just as is taken in any normal bankruptcy case for the discovery and recovery of assets which might belong to this estate which could conceivably be dissipated, lost or in some other way put beyond the control of the creditors.

If he wanted, we would have a qualified officer of this Court installed as trustee pending any appeal or pending anything else. If property is discovered, the Court may make such orders as will protect the bankrupt if he is appealing the order of adjudication.

We have a serious situation here involving the

bankrupt's interest in corporations in another state. We want to institute ancillary proceedings, and the petitioning creditors are going to bear all of this expense themselves. All they want is the opportunity.

At such time as we apply to this Court for relief by ancillary proceedings, Mr. Strong may, if he has objections, at that time present them to the Court, but I think this administration ought to proceed orderly in a fashion suggested by the Bankruptcy Act, even though Mr. Strong has filed his Petition for Review of Adjudication, which, by the way, has become final, and to which [10] I filed a motion to dismiss.

I am sure it has become lost because we changed the hearing several times. The order of adjudication has not been appealed. It is only the order on the motion to set aside adjudication. The order of adjudication has not been appealed.

The Referee: Unless Mr. Strong will raise the jurisdictional point.

Mr. Strong: May the record show that I was not counsel at the time the time expired for doing the act he complains of my doing late.

The Referee: You are absolved, Mr. Strong.

Mr. Strong: Just so it is understood.

Mr. Tiernan: I ask the Court to consider this: Why is there all this delay? These things are taken more or less pro forma here in the Bankruptcy Court.

A man is adjudicated a bankrupt. He is ordered

to file his schedules. He files them. A trustee is elected in a matter of two weeks.

Here we have a situation pending since last December. We have had an order of adjudication back final in some part of June. It is now crowding August. We have yet to conduct a full examination of his wife. We have not had the pleasure of examining Mr. Mason yet.

I ask the Court to consider why these delays and why the aggressive interest of counsel in preventing a [11] simple act required by Section 7 of the Bankruptcy statute, that is, the filing of his schedules after adjudication. These are things, I think, that should move the Court, as well as the bare legal necessity and it is required by the law and the rights of the creditors to pursue their remedies.

He says these creditors, the affidavits indicate that these people are just trying to annoy him and his wife to death. These people are all judgment credits, if the Court please. They have judgments of many years' standing, so it is evident that Mr. Mason is not going to pay any of these claims without a certain amount of pressure.

The Referee: Well, it is, at least, evident that no love is lost between Mr. and Mrs. Mason and Mr. Werner.

Mr. Strong: No.

May I say just one or two words. I just wanted to say that Mr. Tiernan and the Court both know that I am always aggressive in the protection of my clients' rights. I don't believe I am doing anything improper in this case.

Mr. Tiernan: Oh, no, not at all.

Mr. Strong: Your Honor, I think that the basic question here, of course, is whether or not this man is a bankrupt. If the man is not to be adjudicated a bankrupt, then, of course, this Court has no jurisdiction to take [12] any of the steps involved here. Without going into these affidavits, I think your Honor can glean from them that there has been some ill feeling between these parties, as you have indicated, but more than that, my clients, at least, feel that this is all being used as a technique to cause Mrs. Mason to give up her separate property to Mr. Werner and to other creditors for the purpose of satisfying their demands, which are just against Mr. Mason.

The Referee: That may be so. If I accept that as a premise, Mr. Strong, it still would not follow that an end would not be served by Mr. Mason filing a schedule of his assets and liabilities.

Mr. Strong: I would like to point this out to your Honor, that if Mr. Tiernan says it is a simple matter, my client might be somewhat unusual in that he does not want to be adjudged a bankrupt.

He does not want to be relieved of his obligations. He wants an opportunity to pay them even though certain persons are trying to force him to pay, without any assets, at the present time.

He has indicated several times to Mr. Tiernan, I believe, and to other persons involved that when he has the money he is going to pay everybody 100 cents on the dollar. He will not be required to be adjudicated a bankrupt. [13]

The Referee: From your statement just made, I would assume he is not in a position to pay and is, therefore, insolvent and a bankrupt.

Mr. Strong: He may be insolvent, but our position is he has not committed any acts of bankruptcy. Therefore he is not a bankrupt. We have already indicated in the petition the grounds for that.

I don't want to reargue that, but the entire situation here, as far as I can see, is directed toward getting Mrs. Mason's separate property in the corporations and the various properties that she owns. Obviously, Mrs. Mason's property is not subject to the claims of creditors of Mr. Mason, unless it is shown to be community property and we claim it is not, so that all we are trying to do at this time is to prevent a multiplicity of petitions and a lot of running back and forth in court where they are going to file other papers, making additional demands, all of which we say should not stand until the time that this man has finally been adjudicated to be a bankrupt.

I am going to indicate now for Mr. Tiernan's benefit, of course, as he already knows, I am going to be just as aggressive in opposing the other demands he may make, as I have been in the past, for the reason that I feel Mr. Mason should not be adjudged a bankrupt.

If he is not a bankrupt, none of these other [14] proceedings should take place.

The Referee: I am going to have to be inconsistent. Having already signed an order staying

the time for filing the schedules, I will now vacate that order.

As I said before, Mr. Strong, I am concerned with the lack of provisions for stays and so forth pending a review. I think it would be a more orderly procedure for the Bankruptcy Court to stand behind the order of adjudication and require the schedules to be filed.

This, of course, would be without prejudice to your applying for a stay in the reviewing court. I think perhaps that is a better form for you to make your application, so I will require the filing of the schedules.

When could you prepare an order on that, Mr. Tiernan?

I am thinking about enough time to make an application.

Mr. Tiernan: I can prepare that today and will do so.

The Referee: Then, we will make it ten days from——

Mr. Strong: Can we work it out so it happens after August 15, so I can go on a vacation, maybe?

The Referee: I am going on a vacation on August 16.

Mr. Strong: The 16th is a Monday? I am going to be away until the 15th.

The Referee: When are you leaving? [15]

Mr. Strong: I will try to leave Friday.

The Referee: Get the order signed tomorrow. That will give you a couple of days to make your

application. You could set it sometime after you return, I suppose.

Suppose the order provide that the schedules be filed August 20.

Mr. Tiernan: That is all right.

The Referee: This other matter is set for September what?

Mr. Tiernan: It was the 5th or the 6th.

The Referee: I have it on the 3rd.

Mr. Tiernan: 3rd, that is the day after Labor Day.

The Referee: Then, if Mr. Strong's motion is denied in the District Court, that will still give you access to the schedules before the other hearing.

Mr. Tiernan: Yes. Now, your Honor, there is, as I say, a motion filed which evidently became lost, and actually, Mr. Strong hasn't had the requisite time to——

Mr. Strong: That is all right, Mr. Tiernan.

The Referee: The motion for what?

Mr. Tiernan: The motion to dismiss the petition.

Mr. Strong: I don't think it is in the right court. Shouldn't it be in the other court?

The Referee: That is something that always bothers me, because we are required to certify a record on a petition for review whether it is timely or not [16] timely, in our opinion. We certify it downstairs, and we go on from there. You had better renew your motion.

Mr. Tiernan: It could be either place, but I have no objection to making it before the District Court.

I will re-urge it on appeal.

Mr. Strong: It is the same record.

The Referee: Very well. We will stand in recess.

(Whereupon the hearing was adjourned.)

* * *

Reporter's Certificate

I, Yoshiye Yamada, official court reporter of the above entitled Court, do hereby certify that the foregoing pages 1 to 17, inclusive, constitute a true and correct record of the proceedings had in the above entitled matter on Tuesday, July 30, 1957, at the 10:00 o'clock a.m. session.

Dated this 31st day of July, 1957.

/s/ YOSHIYE YAMADA.

[Endorsed]: Filed Aug. 5, 1957. [18]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable William Mathes, Judge of the United States District Court, Southern District of California, Central Division:

I, Ronald Walker, Referee in Bankruptcy in the above-entitled Court, do certify as follows:

This proceeding is for a review of my order denying the motion of the bankrupt to set aside the adjudication in bankruptcy. The proceedings leading to this review are as follows:

I.

Statement of the Case

(1) On December 27, 1957, a Petition in Involuntary Bankruptcy was filed by Erwin P. Werner, and United States Credit Bureau, Inc., alleged creditors of the bankrupt.

(2) Certain preliminary motions were heard before Referee David B. Head resulting in an amended Petition in Involuntary Bankruptcy being filed on March 11, 1957. In the amended petition an additional creditor appeared, one [44*] Helen Pantaleoni. The acts of bankruptcy alleged in the amended petition are set forth in paragraph 4 therein, and in substance are as follows:

(a) In supplementary proceedings upon a judgment in the Superior Court of Los Angeles County on December 6, 1956, the alleged bankrupt concealed property and interests in property with intent to hinder, delay and defraud his creditors, charging the concealment was by falsely testifying as to his interest in certain property at said supplemental proceeding.

(b) The alleged bankrupt in connection with an order of restitution made in a criminal proceeding in the Superior Court of Los Angeles County paid to the probation department the sum of \$300.00 on the first days of October, November, and December of 1956, which constituted a preferential transfer under Section 60a of the Bankruptcy Act.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

(3) A motion to dismiss the amended petition was filed on April 2, 1957, and heard before Referee Head on April 11, 1957. On April 23, 1957, Referee Head ruled on said motion as follows:

(a) "It Is Ordered that paragraph IV A of the amended Petition states a valid Act of Bankruptcy and as to this paragraph the motion to dismiss be and the same hereby is denied."

(b) "And it Is Further Ordered That as to paragraph IV B of the Amended Petition ruling thereon is reserved until the trial of the cause."

(4) On April 23, 1957, notice of such ruling was served upon the alleged bankrupt and his attorney, Laurence J. Rittenband.

(5) No answer or responsive pleading having been thereafter filed to the Amended Petition in involuntary bankruptcy, and the time for filing such responsive pleading [45] having elapsed, Referee Howard V. Calverley, acting for Referee David B. Head, entered an adjudication of bankruptcy on May 20, 1957, and on the same day issued an order to the bankrupt to file schedules within five days.

(6) On May 23, 1957, an answer to said amended petition in bankruptcy was filed.

(7) On the same day, May 23, 1957, the bankrupt filed a notice of motion to set aside the adjudication and the order to file schedules on the ground that the adjudication was entered through "excusable failure of the alleged bankrupt to file a timely answer," referring to the affidavit of Laurence J. Rittenband annexed thereto.

(8) On June 18, 1957, the motion to set aside the adjudication was heard before Referee Ronald Walker in the absence of Referee Head, and was denied. The order to that effect was signed and filed June 26, 1957.

(9) Thereafter, and on July 2, 1957, William R. Strong, Esq., was substituted in place of Laurence J. Rittenband, Esq., as attorney for the bankrupt.

(10) On July 8, 1957, a petition for review was filed and thereafter, and on July 24, 1957, a supplemental petition for review of the order of adjudication was filed. Both the original petition for review and the supplemental petition for review were filed more than ten days after the ruling and were therefore not timely filed. Nevertheless, this matter is now being certified to the District Court under the rule that all petitions for review should be certified regardless of whether they are or are not timely filed.

(11) On July 30, 1957, an order was made requiring the alleged bankrupt to file schedules on August 20, 1957, reserving to the bankrupt the right to apply to the Reviewing Court for a stay of such order. [46]

II.

Reason for Ruling

The petition to set aside the order of adjudication was denied by the certifying referee for the reason that, in his opinion, (1st) there was no excusable neglect shown for the failure to file an answer within the time allowed under the Bankruptcy Act, and

(2nd) there was no showing of a meritorious defense to the said action. In the opinion of the Referee this was a matter entirely within his discretion.

III.

Questions Presented

The questions presented are:

(1) Whether the order of the Referee denying the motion to vacate the adjudication was an abuse of discretion on his part;

(2) Whether the concealment by false testimony at the supplementary proceedings in the Superior Court for Los Angeles County constituted an Act of Bankruptcy. This question was not before Referee Walker on the motion to vacate the adjudication as it had previously been passed on and held to be an Act of Bankruptcy by Referee Head. However, the question is presented upon the review in that it goes to the jurisdiction of the court.

IV.

Documents Accompanying This Certificate

(1) Petition in Involuntary Bankruptcy, filed Dec. 27, 1956.

(2) Amended Petition in Involuntary Bankruptcy, filed Mar. 11, 1957.

(3) Notice of Motion to Dismiss Petition and for More Definite Statement, filed Apr. 2, 1957.

(4) Order on Motion to Dismiss, filed Apr. 23, 1957. [47]

(5) Notice of Ruling, filed April 23, 1957.

(6) Answer to Involuntary Bankruptcy Petition, filed May 23, 1957.

(7) Notice of Motion to Set Aside Adjudication of Bankruptcy, and Order to File Schedules, filed May 23, 1957.

(8) Order Re Motion to Set Aside Adjudication, filed June 26, 1957.

(9) Substitution of Attorneys, filed July 2, 1957.

(10) Petition to Review, filed July 8, 1957.

(11) Supplemental Petition for Review, filed July 24, 1957.

(12) Order on Motion Re Schedules, filed July 30, 1957.

(13) Reporter's Transcript of hearing on June 18, 1957, Re Motion to Set Aside Order of Adjudication, filed Aug. 5, 1957.

(14) Reporter's Transcript of hearing on July 30, 1957, Re Examination under 21A and Motion to Dismiss, filed Aug. 5, 1957.

Dated: August 8, 1957.

/s/ RONALD WALKER,
Referee in Bankruptcy.

[Endorsed]: Filed Aug. 8, 1957. [48]

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTAL
CERTIFICATE ON REVIEW

To the Honorable William Mathes, Judge of the
United States District Court, Southern District
of California, Central Division:

I, Ronald Walker, Referee in Bankruptcy in the
above-entitled Court do certify as follows:

Counsel for the bankrupt has called my attention
to an error made in the original Certificate on Re-
view on page 3, line 21 (10), the petition for review
was filed on July 8, 1957, instead of on July 3, 1957,
as appears in the original certificate.

The comment is made that the original petition
for review was not timely filed if more than ten days
had elapsed from the ruling. Our clerks' office was
closed on July 5, 1957, as was the office of the Clerk
of the District Court. The petition for review was
mailed to the referee on July 3, 1957, but was not
endorsed filed until the following Monday, July 8,
1957, the clerks' office having been closed during the
intervening period.

Dated: August 12, 1957.

/s/ RONALD WALKER,

Referee in Bankruptcy. [49]

[Endorsed]: Filed Aug. 12, 1957.

United States District Court for the Southern
District of California, Central Division

In Bankruptcy No. 76,001-WM

In the Matter of
MONTE G. MASON, Also Known as M. G. MASON,
Bankrupt.

ORDER ON REVIEW OF ADJUDICATION OF
BANKRUPTCY, AND OF REFEREE'S OR-
DER OF JUNE 26, 1957

Upon the petition for review filed by the bankrupt on July 8, 1957; upon the supplemental petition for review filed by the bankrupt on July 24, 1957; upon the certificate of Referee Ronald Walker filed June 20, 1957, and the supplement to the Referee's certificate filed August 12, 1957; and upon the proceedings had before the Referee as appear from his certificate and the supplement thereto; and it appearing to the court that:

(1) The word "concealed" in § 3a(1) of the Bankruptcy Act [11 U.S.C. § 21(a)(1) (1952)] is not limited in meaning to physical secretion [see: *Coghlan v. United States*, 147 F.2d 233, 236-237 (8th Cir), cert. denied, 325 U. S. 888, rehearing denied, 326 U.S. 805 (1945); *United States v. Zimmerman*, 158 F.2d 559 (7th Cir. 1946)]; [50]

(2) The amended petition in involuntary bankruptcy alleges an act of bankruptcy within § 3a(1) of the Bankruptcy Act [11 U.S.C. § 21(a)(1) (1952); Cal. Code Civ. Proc. §§ 714, 715; *In re Burg*, 245 Fed. 173, 178 (N.D.Tex. 1917); *In re Gla-*

zier, 195 Fed. 1020 (M.D.Pa. 1912); 1 Collier, Bankruptcy Par. 3.103 (14th ed. 1940); 1 Remington, Bankruptcy § 123 (5th ed. 1950); cf. Continental Bank and Trust Co. v. Winter, 153 F.2d 397, 399 (2d Cir. 1946)]; and

(3) The failure of the bankrupt to file a timely answer to the amended petition in involuntary bankruptcy was not due to "mistake, inadvertence, surprise, or excusable neglect," within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure;

It Is Ordered that the adjudication, dated May 20, 1957, and the Referee's "Order Re Motion to Set Aside Adjudication," dated June 26, 1957, are hereby confirmed.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon

- (1) Referee Ronald Walker,
- (2) The attorney for the bankrupt, and
- (3) The attorney for the respondent creditors.

November 14, 1957.

/s/ WM. C. MATHES,
United States District Judge.

The Clerk will file issue pro tunc as of Nov. 14, 1957.

/s/ WM. C. MATHES,
U. S. District Judge.

[Endorsed]: Filed Nov. 14, 1957.

Entered Nov. 15, 1957. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Monte G. Mason, the alleged bankrupt herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the within United States District Court confirming an Order of Adjudication of Bankruptcy in these proceedings as well as the Referee's Order re Motion to Set Aside Adjudication, entered in this action on November 14, 1957.

Dated: November 21, 1957.

/s/ WILLIAM STRONG,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Nov. 25, 1957. [52]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 57, inclusive, containing the original:

Petition in Involuntary Bankruptcy.

Petition in Involuntary Bankruptcy
(Amended.)

Notice of Motion to Dismiss Petition and for more Definite Statement.

Order on Motion to Dismiss.

Notice of Ruling.

Answer to Involuntary Bankruptcy Petition.

Notice of Motion to set aside Adjudication of Bankruptcy and Order to File Schedules.

Order re Motion to set aside Adjudication.

Substitution of Attorneys.

Petition to Review.

Supplemental Petition for Review.

Order on Motion re Schedules.

Referee's Certificate on Review.

Referee's Supplemental Certificate on Review.

Order on Review of Adjudication of Bankruptcy and of Referee's Order of June 26, 1957.

Notice of Appeal.

Designation of Record on Appeal.

Statement of Points on Appeal.

B. Two volumes of Reporter's Transcript of Proceedings had on June 18, 1957, and July 30, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated: December 12, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk. [53]

[Endorsed]: No. 15811. United States Court of Appeals for the Ninth Circuit. Monte G. Mason, Appellant, vs. Ernest Utley, Trustee in Bankruptcy of the Estate of Monte G. Mason, Also Known as M. G. Mason, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 6, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit
No. 15811

MONTE MASON,

Appellant,

vs.

UTLEY, et al.,

Respondents.

STATEMENT OF POINTS ON APPEAL

A concise statement of the points upon which appellant intends to rely in this appeal are as follows:

1. That the District Court erred in confirming the adjudication of bankruptcy against appellant.
2. That the Involuntary Petition and Amended Petition does not state any legally cognizable acts of bankruptcy.
3. That the adjudication of the bankruptcy herein is illegal and contrary to the law.
4. That the District Court erred in sustaining the refusal of the Referee in Bankruptcy to vacate the adjudication in bankruptcy to permit appellant to file an answer to the Petition and Amended Petition, to a trial by jury, and to a hearing on the merits.

Respectfully submitted,

/s/ WILLIAM STRONG,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 20, 1958.

No. 15813 ✓

United States
Court of Appeals
for the Ninth Circuit

MANUEL C. BLAS, and THE ESTATE OF
JOSE MARTINEZ TORRES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

FILED

JUN - 4 1958

PAUL P. O'BRIEN, CLERK

No. 15813

United States
Court of Appeals
for the Ninth Circuit

MANUEL C. BLAS, and THE ESTATE OF
JOSE MARTINEZ TORRES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Agana, Guam,

Attorneys for Appellant.

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Assistant U. S. Attorney General,

ROGER P. MARQUIS,

ELIZABETH DUDLEY,

Attorneys,

Department of Justice,

Washington 25, D. C.,

H. G. HOMME, JR.,

United States Attorney,

OLEN W. BURNETT,

Assistant U. S. Attorney,

P. O. Box 308,

Agana, Guam,

Attorneys for Appellee.

In the Superior Court of Guam
Marianas Islands

Civil No. 6-49

Naval Government of Guam, Plaintiff,

vs.

380,438 square meters of land, more or less, situated
in the Municipality of Barrigada, Island of
Guam, Marianas Islands and the Estate of
Antonio Ingay Bayona, deceased, et al.,
Defendants.

DECLARATION OF TAKING

I, C. A. Pownall, Governor of Guam, do hereby
declare that:

I.

The land hereinafter described is taken under
and in accordance with the provisions of Sections
1237 to 1258, inclusive, as amended, of the Code of
Civil Procedure of Guam.

II.

The public use for which said land is taken is the
procurement of a suitable permanent site for the
location of the Village of Barrigada in the Municipality of Barrigada, as an aid to and in the furtherance of the program for the rehabilitation of the Guamanian people and the economy of Guam. That said land is suitable and necessary therefor, has been selected by me for said purpose and is re-

quired for immediate use in order to carry out such purpose.

III.

That the land subject of this proceeding is situated in the Municipality of Barrigada, Island of Guam, Marianas Islands, as delineated on Land and Claims Commission Drawing No. P-360, dated 22 December 1948 and entitled "U. S. Naval Government of Guam, M. I., Land & Claims Commission, Barrigada Village Boundary, Land Square 18, Section 2, Municipality of Barrigada," and is more particularly bounded and described as follows:

From Triangulation Station "Reservoir", having Land and Claims Commission (1945) grid coordinates 49,727.55 meters North and 57,025.07 meters East, South 83 degrees 56 minutes 14 seconds West for a distance of 1,608.47 meters to a corner marked No. 1, which is the point or place of beginning, said corner having Land and Claims Commission (1945) grid coordinates 49,557.67 meters North and 55,425.60 meters East; thence running South 12 degrees 20 minutes 44 seconds West for a distance of 288.11 meters to a corner marked No. 2; which is also a point of curvature; thence running along the arc of curve for a distance of 217.12 meters to a corner marked No. 3, which is also a point of tangency, curve data being central angle 20 degrees 49 minutes 35 seconds radius 597.33 meters; thence running South 81 degrees 34 minutes 44 seconds West for a distance of 29.71 meters to a corner marked No. 4; thence running South 34 degrees 54 minutes 07 seconds West for a distance of 16.28

meters to a corner marked No. 5; thence running South 89 degrees 31 minutes 37 seconds West for a distance of 269.15 meters to a corner marked No. 6; thence running North 00 degrees 07 minutes 30 seconds East for a distance of 45.00 meters to a corner marked No. 7; thence running North 88 degrees 52 minutes 23 seconds East for a distance of 25.26 meters to a corner marked No. 8; thence running North 00 degrees 08 minutes 19 seconds East for a distance of 113.53 meters to a corner marked No. 9; thence running North 89 degrees 25 minutes 22 seconds West for a distance of 122.58 meters to a corner marked No. 10; thence running South 03 degrees 39 minutes 44 seconds West for a distance of 49.83 meters to a corner marked No. 11; thence running North 88 degrees 05 minutes 03 seconds West for a distance of 74.21 meters to a corner marked No. 12; thence running South 00 degrees 56 minutes 44 seconds West for a distance of 61.90 meters to a corner marked No. 13; thence running North 89 degrees 45 minutes 38 seconds West for a distance of 37.91 meters to a corner marked No. 14; thence running South 00 degrees 06 minutes 50 seconds West for a distance of 18.14 meters to a corner marked No. 15; thence running South 89 degrees 51 minutes 46 seconds West for a distance of 123.40 meters to a corner marked No. 16; thence running North 00 degrees 04 minutes 51 seconds West for a distance of 268.10 meters to a corner marked No. 17; thence running North 29 degrees 31 minutes 41 seconds West for a distance of 81.06 meters to a corner marked No. 18;

thence running North 85 degrees 29 minutes 49 seconds West for a distance of 60.48 meters to a corner marked No. 19; thence running North 02 degrees 09 minutes 19 seconds East for a distance of 58.37 meters to a corner marked No. 20; thence running North 85 degrees 40 minutes 31 seconds East for a distance of 165.60 meters to a corner marked No. 21; thence running North 01 degree 15 minutes 05 seconds West for a distance of 88.14 meters to a corner marked No. 22; thence running North 07 degrees 15 minutes 43 seconds West for a distance of 165.20 meters to a corner marked No. 23; thence running North 21 degrees 10 minutes 26 seconds East for a distance of 48.74 meters to a corner marked No. 24; thence running South 68 degrees 51 minutes 59 seconds East for a distance of 141.25 meters to a corner marked No. 25; thence running South 67 degrees 42 minutes 38 seconds East for a distance of 290.62 meters to a corner marked No. 26 which is also a point of curvature; thence running along the arc of curve for a distance of 124.11 meters to a corner marked No. 27, which is also a point of tangency, curve data being central angle 09 degrees 57 minutes 45 seconds, radius 713.79 meters; thence running South 77 degrees 40 minutes 23 seconds East for a distance of 136.12 meters to the corner marked No. 1, which is the point or place of beginning.

The total area contained herein is 380,438 square meters.

There is specifically excepted from the total land area of 380,438 square meters, more or less, as

above set forth and as shown in Exhibit "A", all lands or interests therein owned by the United States of America or the Naval Government of Guam, leaving, after said exception, an area of 368,561 square meters of land, more or less.

IV.

The estate taken for said public use is the fee simple title in and to said land.

V.

A copy of Land and Claims Commission Drawing No. P-360, dated 22 December 1948 and entitled, "U. S. Naval Government of Guam, M. I., Land & Claims Commission, Barrigada Village Boundary, Land Square 18, Section 2, Municipality of Barrigada" showing the land taken is attached hereto as Exhibit "A" and made a part hereof as though set forth at length.

VI.

The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said tracts is Ten Thousand and No/100 Dollars (\$10,000.00), which sum I deposit herewith in the registry of the said Court for the use and benefit of the person or persons entitled thereto. I am of the opinion that the ultimate award for the taking of such land will be within the limits prescribed by law as the price to be paid therefor.

In witness whereof I have signed this Declara-

tion of Taking this 11th day of April, 1949, in the Municipality of Agana, Island of Guam, Marianas Islands.

/s/ C. A. POWNALL,
Governor of Guam.

[Endorsed]: Filed April 11, 1949.

[Title of Superior Court and Cause.]

COMPLAINT IN CONDEMNATION

The Plaintiff, the Naval Government of Guam, by Harold W. McKinney, Attorney General of Guam, and Emil G. Friedlander, Special Attorney for the Naval Government of Guam, acting under the instructions and at the direction of the Governor of Guam, for cause of action against the above named defendants, alleges as follows:

I.

That this proceeding is instituted and the land hereinafter described is taken and condemned pursuant to and under the provisions and authority of, and for the uses and purposes authorized by, the provisions of Sections 1237 to 1258 inclusive, as amended, of the Code of Civil Procedure of Guam.

II.

That the land hereinafter described has been selected by the Governor of Guam as the permanent site of the Village of Barrigada as an aid to and in the furtherance of the program for the

rehabilitation of the Guamanian people and the economy of Guam, and is sought to be taken and condemned for said purpose and use, and is suitable and necessary therefor; that said use of the land constitutes a public use, and said land is required for immediate use in order to carry out said purpose.

III.

That the land subject of this proceeding is situated in the Municipality of Barrigada, Island of Guam, Marianas Islands, as delineated on Land and Claims Commission Drawing No. P-360, dated 22 December 1948 and entitled, "U. S. Naval Government of Guam, M. I., Land & Claims Commission, Barrigada Village Boundary, Land Square 18, Section 2, Municipality of Barrigada," and is more particularly bounded and described as follows:

[Description of land is the same as set out at pages 4-6 of this printed record.]

The total area contained herein is 380,438 square meters.

There is specifically excepted from the total land area of 380,438 square meters, more or less, as above set forth and as shown in Exhibit "A", all lands or interests therein owned by the United States of America or the Naval Government of Guam, leaving, after said exception, an area of 368,561 square meters of land, more or less.

IV.

That a copy of said Land & Claims Commission Drawing No. P-360 showing the lands above de-

scribed is attached hereto as Exhibit "A" and made a part hereof as though set forth at length.

V.

That Plaintiff is informed and believes, and therefore alleges, that the above described land includes the whole of Lots Numbered 1021A, 1022, 1075, 1076, 1078 and 1079, and parts of Lots Numbered 1021, 1023, 1068, 1069, 1070, 1071, 1073, 1074, 1077, 1080, 1081, 1082, 1084, 1085, 2263, 2264, and 2365, as delineated on Land and Claims Commission Drawing No. P-360.

VI.

That the estate or interest which Plaintiff seeks to take and condemn is the fee simple title in and to the lands above described.

VII.

That the apparent and purported owners of the lands above described are as follows:

Lot No. 1021. Ostensible Owner: Juan Cruz Aguon.

Lot No. 1021-A. Ostensible Owner: Antonio Respicio Perez.

Lot No. 1022. Ostensible Owner: Antonio Respicio Perez.

Lot No. 1023. Ostensible Owner: Ignacio Cruz Muna.

Lot No. 1069. Ostensible Owner: Jose Martinez Torres.

Lot No. 1070. Ostensible Owner: The Estate of Benigno Cruz Mendiola, deceased, represented by Concepcion Franquez Mendiola, Administratrix;

Concepcion Franquez Mendiola, Rosa F. Mendiola, Vicente F. Mendiola, Jose F. Mendiola, Josefina Cruz Cruz as Guardian of the persons and estates of David Mendiola Cruz and Francisco Mendiola Cruz, minor heirs of Maria Mendiola Cruz.

Lot No. 1073. Ostensible Owner: Juana Pangelinan Martinez, Juan Pangelinan Martinez, Joaquin Pangelinan Martinez, Vicente Pangelinan Martinez, Manuel Pangelinan Martinez, Jesus Pangelinan Martinez, Francisco Pangelinan Martinez, Rita Martinez Unpingco, Maria Martinez Flores, Rosa Pangelinan Martinez.

Lot No. 1074. Ostensible Owner: Manuel C. Blas.

Lot No. 1075. Ostensible Owner: Jose Martinez Torres.

Lot No. 1076. Ostensible Owner: Guiseppe D'Angelo.

Lot No. 1077. Ostensible Owner: The Estate of Antonio Ingay Bayona, also known as Antonio Ballona Ingay, deceased, represented by Juan Iglesias Bayona, Administrator; Juan Iglesias Bayona, Susana Bayona Mesa, Maria Bayona Salas, Jose Gonzolo Bayona, Antonio Bayona Bayona, Individually and as Administrator of the Estate of Catalina Iglesias Bayona, and as Guardian of the person and estate of the minor incompetent Disederio Bayona Bayona.

Lot No. 1078. Ostensible Owner: The Estate of Fabian Gomez Idor, deceased, represented by Jose R. Fejerang, Administrator.

Lot No. 1079. Ostensible Owner: Juan Leon Guerrero Concepcion.

Lot No. 1080. Ostensible Owner: Guiseppe D'Angelo.

Lot No. 1081. Ostensible Owner: The Estate of Ramon Cruz Salas, deceased, represented by Antonio Leon Guerrero Salas, Administrator; Antonio L. G. Salas, Ursula Cruz Salas, Matilda Salas Blas.

Lot No. 1082. Ostensible Owner: Julian Lujan Flores.

Lot No. 1083. Ostensible Owner: Ignacio Cruz Muna.

Lot No. 1084. Ostensible Owner: Encarnacion Peraira Cruz, Carlos Peraira Cruz, Regina Peraira Cruz, Candelaria Peraira Cruz, Alejandro Peraira Cruz.

Lot No. 1085. Ostensible Owner: Juan Cruz Aguon.

Lot No. 2263. Ostensible Owner: Juana Pangelinan Martinez, Juan Pangelinan Martinez, Joaquin Pangelinan Martinez, Vicente Pangelinan Martinez, Manuel Pangelinan Martinez, Jesus Pangelinan Martinez, Francisco Pangelinan Martinez, Rita Martinez Unpingco, Maria Martinez Flores, Rosa Pangenilan Martinez.

Lot No. 2264. Ostensible Owner: Guiseppe D'Angelo.

Lot No. 2365. Ostensible Owner: Jose Torres Crisostomo.

Lot No. 1068. Ostensible Owner: Rosa Sablan Camacho, Maria C. Arriola, Manuela S. Camacho, Ana S. Camacho, Gregorio S. Camacho, Jose C. Camacho, Jesus C. Camacho, Rosario S. Camacho,

Estate of Soledad C. Arriola, represented by Vicente F. Arriola, Administrator.

VIII.

That said apparent and purported owners, and each of them, and if any of them be deceased then their respective heirs, executors, administrators, legatees, devisees, trustees and/or assigns, known and unknown, immediate or remote of such deceased, and all other persons, companies, and corporations, known and unknown and their successors and assigns who may have or claim to have any right, title or interest in and to the lands above described of any character whatsoever, are made defendants.

IX.

Wherefore, Plaintiff prays:

1. For Judgment:

(a) Decreeing said lands above described to the extent of title and interest which Plaintiff seeks to acquire by this proceeding are condemned for necessary public use of the Plaintiff as authorized by law; that all of said lands are necessary and suitable therefor;

(b) Decreeing that upon payment into the registry of this Court for the use of the person or persons entitled thereto of the sum estimated to be just compensation for the taking of the lands above described, title to said land is vested in the Naval Government of Guam in fee simple;

(c) Determining the value of the property subject of this proceeding and each separate interest

therein, and directing the payment for each separate interest to the person or persons entitled thereto.

2. For such other and further relief as may be lawful and proper.

NAVAL GOVERNMENT OF
GUAM,

/s/ By HAROLD W. McKINNEY,
Attorney General of Guam.

/s/ By EMIL G. FRIEDLANDER,
Special Attorney for the Naval
Government of Guam.

Verification Attached.

[Endorsed]: Filed April 11, 1949.

In the District Court of Guam
Territory of Guam

Civil No. 6-49

United States of America, Plaintiff,

vs.

380,438 Square Meters of land, more or less, in the Municipality of Barrigada, Island of Guam, Marianas Islands, and the Estate of Antonio Ingay Bayona, deceased, et al., Defendant.

AMENDED DECLARATION OF TAKING

Whereas, there was filed in this cause a Declaration of Taking dated 11 April 1949; and

Whereas, it has been determined that a revised

description of the lands and a revised map thereof should be filed in this proceeding; and

Whereas, the estimated just compensation heretofore deposited has been redetermined and the required allocations to each tract made,

Now, Therefore, I, Secretary of the Navy, do hereby amend the Declaration of Taking in the following particulars:

1. By striking therefrom the first six lines of paragraph III, and substituting in lieu thereof the following:

That the land subject of this proceeding is situated in the Municipality of Barrigada, Island of Guam, Marianas Islands, delineated on a map entitled "Acquisition of Lands, Barrigada Village, Guam, M. I.", dated March 27, 1952, and is more particularly bounded and described as follows:

2. By striking therefrom the last five lines of paragraph III, and substituting in lieu thereof the following:

Less and Except all lands or interests therein owned by the United States of America or the Naval Government of Guam, containing after such exceptions, 368,561 square meters of land, more or less.

3. By striking all of paragraph V and substituting in lieu thereof the following:

A copy of the map entitled "Acquisition of Lands, Barrigada Village, Guam, M. I." dated March 27, 1952, showing the land taken, and delineating the several parcels is attached hereto as Exhibit "A" and made a part hereof.

4. By striking all of paragraph VI and substituting in lieu thereof the following:

The sum of reestimated just compensation for said lands, with all buildings and improvements thereon, and all appurtenances thereto, for the estate above set forth, as determined by me, is Six Thousand Eight Hundred and Seventy-One (\$6,871.00) Dollars, which said sum is deposited in the registry of the court for the use and benefit of the persons entitled thereto and more particularly allocated in Schedule "A" attached hereto and made a part hereof.

I am of the opinion that the ultimate award for the taking of these lands will be within the limits prescribed by the Congress.

In Witness Whereof, the petitioner, by and through the Secretary of the Navy has caused this Amended Declaration of Taking to be signed in the City of Washington, District of Columbia, this 1st day of May 1952.

/s/ DAN A. KIMBALL,
Secretary of the Navy.

Schedule "A"

The persons having title to or other interests in the lands described in the Declaration of Taking, delineated on Exhibit "A", and more particularly identified below, and the amounts estimated to be just compensation for each respective parcel, are as follows:

Parcel: 1A and 1B—Owner: Juana Pangelinan

Martinez, C.I. 87, 1/10th interest; Joaquin Pangelinan Martinez, C.I. 90, 1/10th interest; Juan Pangelinan Martinez, C.I. 88, 1/10th interest; Manuel Pangelinan Martinez, C.I. 9891, 1/10th interest; Jesus Pangelinan Martinez, C.I. 15295, 1/10th interest; Francisco Pangelinan Martinez, C.I. 19440, 1/10th interest; Rosa Pangelinan Martinez, also known as Rosa Martinez Flores, C.I. 13427, 1/10th interest; H. O. Vicente Pangelinan Martinez, deceased, represented by Concepcion Cruz Martinez, Administratrix, 1/10th interest; Rita Pangelinan Martinez (also known as Rita Martinez Unpingco) C.I. 9343, 1/10th interest; Maria Pangelinan Martinez (also known as Maria Martinez Flores), C.I. 9078, 1/10th interest. Area (sq. m.): 13,901. Deposit: \$245.00.

Description: Parts of Lot No. 1073, Municipality of Barrigada, sometime designated unofficially as Lots 1073-2 and 1073-3.

Parcel: 2—Owner: Manuel Cruz Blas, C.I. 4934. Area (sq. m.): 40,104. Deposit: \$600.00.

Description: Part of Lot No. 1074, Municipality of Barrigada, sometime designated unofficially as Lot 1074-3.

Parcel: 3—Owner: H. O. Benigno Cruz Mendiola, deceased, represented by Jose Franquez Mendiola, Adm. Area (sq. m.): 14,771. Deposit: \$390.00.

Description: Part of Lot No. 1070, Municipality of Barrigada, sometime designated unofficially as Lot 1070-2.

Parcel: 4—Owner: Jose Martinez Torres, de-

ceased, 5 May, 1950; now H. O. Jose Martinez Torres, deceased, represented by Felix Calvo Torres, Adm. Area (sq. m.): 72,126. Deposit: \$1195.00.

Description: Part of Lot No. 1069, Municipality of Barrigada, sometime designated unofficially as Lot 1069-3.

Parcel: 5—Owner: H.O. Francisco Santos Camacho, deceased, represented by Rosa Sablan Camacho, Administratrix. Area (sq. m.): 3,455. Deposit: \$95.00.

Description: Part of Lot No. 1068, Municipality of Barrigada, sometime designated unofficially as Lot 1068-2.

Parcel: 6—Owner: Ignacio Cruz Muna (also known as Ignacio Muna Cruz). Area (sq. m.): 15,629. Deposit: \$395.00.

Description: Part of Lot No. 1023, Municipality of Barrigada, sometime designated unofficially as Lot 1023-2.

Parcel: 7—Owner: Juan Cruz Aguon, C.I. 2804. Area (sq. m.): 6,190. Deposit: \$125.00.

Description: Part of Lot No. 1021, Municipality of Barrigada, sometime designated unofficially as Lot 1021-2.

Parcel: 8—Owner: Juan Cruz Aguon, C.I. 2804. Area (sq. m.): 10,726. Deposit: \$210.00.

Description: Part of Lot No. 1085, Municipality of Barrigada, sometime designated unofficially as Lot 1085-2.

Parcel: 9—Owner: Encarnacion Peraira Cruz, C.I. 4932, $\frac{1}{2}$ interest; Carlos Peraira Cruz, C.I.

8595, $\frac{1}{8}$ interest; Regina Peraira Cruz, C.I. 12013, $\frac{1}{8}$ interest; Candelaria Peraira Cruz, C.I. 14072, $\frac{1}{8}$ interest; Alejandro Peraira Cruz, C.I. 16117, $\frac{1}{8}$ interest; represented by Regina Peraira Cruz, Attorney in Fact. Area (sq. m.): 3,927. Deposit: \$105.00.

Description: Part of Lot No. 1084, Municipality of Barrigada, sometime designated unofficially as Lot 1084-2.

Parcel: 10—Guiseppe D'Angelo, C.I. 7667. Area (sq. m.): 12,281. Deposit: \$220.00.

Description: Part of Lot No. 1080, Municipality of Barrigada, sometime designated unofficially as Lot 1080-2.

Parcel: 11—Owner: H. O. Juan Leon Guerrero Concepcion (also known as Juan Concepcion Leon Guerrero), deceased, represented by Ignacio Sablan Leon Guerrero, Adm. Area (sq. m.): 17,377. Deposit: \$315.00.

Description: All of Lot 1079, Municipality of Barrigada.

Parcel: 12—Owner: Antonio Respicio Perez, C.I. 3114. Area (sq. m.): 636. Deposit: \$50.00.

Description: All of Lot No. 1021-A, Municipality of Barrigada.

Parcel: 13—Owner: Antonio Respicio Perez, C.I. 3114. Area (sq. m.): 19,275. Deposit: \$380.00.

Description: All of Lot No. 1022, Municipality of Barrigada.

Parcel: 14—Owner: H. O. Fabian Gomez Idor, deceased, represented by Jose R. Fejerang, Adm. Area (sq. m.): 9,860. Deposit: \$150.00.

Description: All of Lot No. 1078, Municipality of Barrigada.

Parcel: 15—Owner: H.O. Jose Martinez Torres, deceased, represented by Felix Calvo Torres, Adm. Area (sq. m.): 16,480. Deposit: \$360.00.

Description: All of Lot No. 1075, Municipality of Barrigada.

Parcel: 16—Owner: H. O. Antonio Ingay Bayona (also known as Antonio Ballona Ingay) deceased, represented by Juan Iglesias Bayona, Adm. Area (sq. m.): 47,540.62 Deposit: \$820.00.

Description: Part of Lot No. 1077, Municipality of Barrigada, sometime designated unofficially as Lot 1077-2.

Parcel: 17—Owner: H. O. Ramon Cruz Salas, deceased, represented by Antonio Leon Guerrero Salas, Adm. Area (sq. m.): 14,199.88. Deposit: \$385.00.

Description: Part of Lot No. 1081, Municipality of Barrigada, sometime designated unofficially as Lot 1081-2.

Parcel: 18—Owner: Julian Lujan Flores. Area (sq. m.): 594.46. Deposit: \$25.00.

Description: Part of Lot No. 1082, Municipality of Barrigada, sometime designated unofficially as Lot 1082-2.

Parcel: 19—Owner: Jose Torres Crisostomo. Area (sq. m.): 6,394.14. Deposit: \$110.00.

Description: Part of Lot No. 2365, Municipality of Barrigada, sometime designated unofficially as Lot 2365-2.

Parcel: 20:—Owner: Guiseppe D'Angelo, C.I. 7667. Area (sq. m.): 31,481.50. Deposit: \$630.00.

Description: Part of Lot No. 2264, Municipality of Barrigada, sometime designated unofficially as Lot 2264-2.

Parcel: 21—Owner: Guiseppe D'Angelo, C.I. 7667. Area (sq. m.): 961. Deposit: \$50.00.

Description: All of Lot No. 1076, Municipality of Barrigada.

Parcel: 22—Owner: Juana Pangelinan Martinez, C.I. 87, 1/10th interest; Juan Pangelinan Martinez, C.I. 88, 1/10th interest; Joaquin Pangelinan Martinez, C.I. 90, 1/10th interest; H. O. Vicente Pangelinan Martinez, deceased, represented by Concepcion Pangelinan Martinez, Admx. 1/10th interest; Manuel Pangelinan Martinez, C.I. 9891, 1/10th interest; Jesus Pangelinan Martinez, C.I. 15295, 1/10th interest; Francisco Pangelinan Martinez, C.I. 19440, 1/10th interest; Rita Pangelinan Martinez (also known as Rita Martinez Unpingco), C.I. 9343, 1/10th interest; Maria Pangelinan Martinez (also known as Maria Martinez Flores), C.I. 9078, 1/10th interest; Rosa Pangelinan Martinez (also known as Rosa Martinez Flores) C.I. 13427, 1/10th interest. Area (sq. m.): 259. Deposit: \$15.00.

Description: Part of Lot No. 2263, Municipality of Barrigada, sometime designated unofficially as Lot 2263-2.

Any and all other right, title and interest: \$1.00.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

SECOND AMENDMENT TO COMPLAINT

The second amendment to the complaint for condemnation of the United States of America, represented herein by James G. Mackey, United States Attorney and Hollis Atkinson, Special Attorney, Department of Justice, alleges:

That an amended declaration of taking and a judgment on amended declaration of taking have heretofore been filed herein, and this second amendment to the complaint is filed to amend the description and designation of the lands and to revise the listing of ostensible owners to conform with that set forth in said amended declaration of taking and judgment on amended declaration of taking, as follows:

1. By striking the first six lines of Paragraph III of the complaint and substituting in lieu thereof the following:

That the land subject of this proceeding is situated in the Municipality of Barrigada, Island of Guam, Marianas Islands, delineated on a map entitled "Acquisition of Lands, Barrigada Village, Guam, M.I.", dated March 27, 1952, and is more particularly bounded and described as follows:

2. By striking the last five lines of Paragraph III and substituting in lieu thereof the following:

Less and Except all lands or interests therein

owned by the United States of America or the Naval Government of Guam, containing after such exceptions, 368,561 square meters of land, more or less.

3. By striking all of Paragraph IV and substituting in lieu thereof the following:

A copy of the map entitled "Acquisition of Lands, Barrigada Village, Guam, M.I.", dated March 27, 1952, showing the land taken, and delineating the several parcels is attached to the amended declaration of taking filed herein as Exhibit "A".

4. By striking all of Paragraph V and substituting in lieu thereof the following:

That Plaintiff is informed and therefore alleges that the above described land includes the whole of Lots designated 1021-2, 1021-A, 1022, 1023-2, 1068-2, 1069-3, 1070-2, 1073-2 and 1073-3, 1074-3, 1075, 1076, 1077-2, 1078, 1079, 1080-2, 1081-2, 1082-2, 1084-2, 1085-2, 2263-2, 2264-2, 2365-2 as delineated on a map entitled "Acquisition of Lands, Barrigada Village, Guam, M.I.", dated March 27, 1952 attached to the amended declaration of taking filed herein as Exhibit "A".

5. By striking all of Paragraph VII of the complaint and substituting in lieu thereof the following:

The persons having or claiming an interest in the property whose names are now known are:

Parcel: 1A and 1B. Lot: 1073-2 and 1073-3. Ostensible Owners: Juana Pangelinan Martinez, Juan Pangelinan Martinez, Joaquin Pangelinan Martinez, Heirs of Vicente Pangelinan Martinez, Deceased, Concepcion Cruz Martinez, Administratrix, Manuel Pangelinan Martinez, Jesus Pangelinan Martinez, Francisco Pangelinan Martinez, Joaquin Pangelinan Martinez, Attorney in Fact, Rita Martinez Unpingco, Maria Martinez Flores, Rosa Pangelinan Martinez, now known as Rosa Martinez Flores.

Parcel: 2. Lot: 1074-3. Ostensible Owners: Manuel C. Blas, William M. Byrne, lessee.

Parcel: 3. Lot: 1070-2. Ostensible Owners: Heirs of Benigno Cruz Mendiola, Deceased, Jose Franquez Mendiola, Administrator.

Parcel: 4. Lot: 1069. Ostensible Owners: Jose Martinez Torres, Deceased, Felix Calvo Torres, Administrator.

Parcel: 5. Lot 1068-2. Ostensible Owners: Heirs of Francisco Santos Camacho, Deceased, Rose Sablan Camacho, Administratrix, Rosa S. Camacho, Maria C. Arriola, Manuela S. Camacho, Ana S. Camacho, Gregorio S. Camacho, Jose C. Camacho, Rosario S. Camacho, Jesus C. Camacho. Unknown Heirs, Devisees and Creditors of Soledad C. Arriola, Deceased, Vicente F. Arriola, Administrator.

Parcel: 6. Lot: 1023-2. Ostensible Owners: Ignacio Cruz Muna, aka Ignacio Muna Cruz.

Parcel: 7. Lot: 1021-2. Ostensible Owner: Juan Cruz Aguon.

Parcel: 8. Lot: 1085-2. Ostensible Owner: Juan Cruz Aguon.

Parcel: 9. Lot: 1084-2. Ostensible Owners: Encarnacion Peraira Cruz, Carlos Peraira Cruz, Regina Peraira Cruz, Candelaria Peraira Cruz. Alejandro Peraira Cruz, Represented by Regina Peraira Cruz, Attorney-in-Fact.

Parcel: 10. Lot: 1080-2. Ostensible Owner: Giuseppe D'Angelo.

Parcel: 11. Lot: 1079. Ostensible Owners: Heirs of Juan Leon Guerrero Concepcion, aka Juan Concepcion Leon Guerrero, Ingacio Sablan Leon Guerrero, Administrator.

Parcel: 12. Lot: 1021-A. Ostensible Owner: Antonio Respicio Perez.

Parcel: 13. Lot: 1022. Ostensible Owner: Antonio Respicio Perez.

Parcel: 14. Lot: 1078. Ostensible Owners: Heirs of Fabian Gomez Idor, Deceased, Jose R. Fejerang, Administrator.

Parcel: 15. Lot: 1075. Ostensible Owners: Estate of Jose Martinez Torres, Deceased, Felix Calvo Torres, Administrator.

Parcel: 16. Lot: 1077-2. Ostensible Owners: Heirs of Antonio Ingay Bayona, Deceased, aka Antonio Ballona Ingay, Juan Iglesias Bayona, Administrator.

Parcel: 17. Lot: 1081-2. Ostensible Owners: Heirs of Ramon Cruz Salas, Deceased, Antonio Leon Guerrero Salas, Administrator.

Parcel: 18. Lot: 1082-2. Ostensible Owner: Julian Lujan Flores.

Parcel: 19. Lot: 2365-2. Ostensible Owner: Jose Torres Crisostomo.

Parcel: 20. Lot: 2264-2. Ostensible Owner: Giuseppe D'Angelo.

Parcel: 21. Lot: 1076. Ostensible Owner: Giuseppe D'Angelo.

Parcel: 22. Lot: 2263-2. Ostensible Owners: Juana Pangelinan Martinez, Juan Pangelinan Martinez, Joaquin Pangelinan Martinez, Heirs of Vicente Pangelinan Martinez, Deceased, Concepcion Cruz Martinez, Administratrix, Manuel Pangelinan Martinez, Jesus Pangelinan Martinez, Francisco Pangelinan Martinez, Joaquin Pangelinan Martinez, Attorney in Fact, Rita Martinez Unpingco, Maria Martinez Flores, Rosa Pangelinan Martinez, now known as Rosa Martinez Flores.

Wherefore Plaintiff prays judgment that the property be condemned and that just compensation for the taking be ascertained and awarded, and for such other relief as may be lawful and proper.

UNITED STATES OF AMERICA,

/s/ By JAMES G. MACKEY,
United States Attorney,

/s/ HOLLIS ATKINSON,
Special Attorney,
Department of Justice.

[Endorsed]: Filed September 15, 1952.

In The District Court of Guam
Territory of Guam

Civil No. 6-49

UNITED STATES OF AMERICA,

Plaintiff,

vs.

380,438 square meters of land, more or less, situate
in the Municipality of Barrigada, Island of
Guam, Marianas Islands and the Estate of An-
tonio Ingay Bayona, Deceased, et al.,

Defendants.

DEFICIENCY JUDGMENT

The above-entitled case coming on for trial before the court and jury on April 8, 1957, at 9:30 o'clock in the forenoon, pursuant to due notice given, the Plaintiff and the Defendants appearing by their respective attorneys, the said parties having presented their evidence, the Plaintiff at the close of all the evidence having moved for a directed verdict in accordance with the evidence adduced by Plaintiff; and the Court, after hearing and considering all of the evidence and after hearing upon said motion, having found that the defendants failed to adduce relevant and competent evidence sufficient to support a verdict and having sustained the said motion and directed entry of judgment in accordance therewith;

And it appearing that the sums set after the lot and tract numbers hereinafter listed have been de-

terminated to be the just compensation payable by the United States of America for the taking of title in fee simple absolute to the respective lots or parts thereof and tracts, to-wit:

Lot No. 1074, Barrigada, Tract No. 2	\$1220.00
Lot No. 1069, Barrigada, Tract No. 4	2860.00
Lot No. 1068, Barrigada, Tract No. 5	225.00
Lot No. 1075, Barrigada, Tract No. 15	565.00

all as described in the complaint and declaration of taking, and amendments thereto, filed herein, which sums shall cover all claims of any kind or character whatever for the taking of title in fee simple absolute to the said lands by the United States of America;

And it further appearing that the persons entitled to said awards are as hereinafter listed, to-wit:

To the award for Lot No. 1074, Barrigada, Tract No. 2: Manuel C. Blas.

To the award for Lot No. 1069, Barrigada, Tract No. 4: Felix Calvo Torres as Administrator of the Estate of Jose Martinez Torres, Deceased.

To the award for Lot No. 1068, Barrigada, Tract No. 5: Rosa Sablan Camacho as administratrix of the Estate of Francisco Santos Camacho, Deceased.

To the award for Lot No. 1075, Barrigada, Tract No. 15: Felix Calvo Torres as Administrator of the Estate of Jose Martinez Torres, Deceased.

And it further appearing that the sums of Six Hundred Dollars (\$600.00) for Lot No. 1074, Barrigada, Tract No. 2; One Thousand One Hundred

and Ninety-Five Dollars (\$1195.00) for Lot No. 1069, Barrigada, Tract No. 4; Ninety-Five Dollars (\$95.00) for Lot No. 1068, Barrigada, Tract No. 5; and Three Hundred and Sixty Dollars (\$360.00) for Lot No. 1075, Barrigada, Tract No. 15, for satisfaction of judgment herein, have heretofore been deposited by the United States of America in the registry of the court; and that pursuant to order of this court upon application of Defendant, the aforesaid sum of One Thousand One Hundred and Ninety-Five Dollars (\$1195.00) has heretofore been paid to and received by Defendant Felix Calvo Torres as Administrator of the Estate of Jose Martinez Torres, Deceased.

Now Therefore It Is Ordered, Adjudged, and Decreed that judgment be entered against the United States of America as follows:

For the sum of One Thousand Two Hundred and Twenty Dollars (\$1220.00), with interest on the sum of Six Hundred and Twenty Dollars (\$620.00) at the rate of six per cent per annum from April 11, 1949, until paid, which is hereby awarded to Manuel C. Blas.

For the sum of One Thousand Six Hundred and Sixty-Five Dollars (\$1665.00) with interest at the rate of six per cent per annum from April 11, 1949, until paid, which is hereby awarded to Felix Calvo Torres as Administrator of the Estate of Jose Martinez Torres, Deceased.

For the sum of Two Hundred and Twenty-Five Dollars (\$225.00), with interest on the sum of One Hundred and Thirty Dollars (\$130.00), at the

rate of six per cent per annum from April 11, 1949, until paid, which is hereby awarded to Rosa Sablan Camacho as Administratrix of the Estate of Francisco Santos Camacho, Deceased.

For the sum of Five Hundred and Sixty-Five Dollars (\$565.00), with interest on the sum of Two Hundred and Five Dollars (\$205.00), at the rate of six per cent per annum from April 11, 1949, which is hereby awarded to Felix Calvo Torres, as Administrator of the Estate of Jose Martinez Torres, Deceased.

It Is Further Ordered that the Clerk of the District Court of Guam shall pay to the said Defendants the sums now on deposit in the Registry of this Court for their respective tracts and lots by checks drawn on the said funds countersigned by the Judge of this Court, upon taking proper receipts therefor, and the said Clerk shall likewise pay to the said Defendants the balances of the sums hereinabove adjudged and awarded to them respectively as soon as possible after receipt of the same from the United States of America, and when all of the said sums have been so paid the Clerk shall note upon the docket that this judgment has been paid in full.

Dated this 12th day of April, 1957.

/s/ PAUL D. SHRIVER,

Judge of the District Court of Guam

[Endorsed]: Filed April 12, 1957.

[Title of District Court and Cause.]

MOTION TO SET ASIDE ORDER AND
JUDGMENT AND FOR NEW TRIAL

To: The Judge, District Court of Guam:

Come Now, Defendants, and most respectfully move this court to set aside the order and judgment herein and to grant a new trial of the above-entitled cause for the following reasons, to-wit:

1. That the court erred in not submitting the case to the jury, there being substantial and relevant facts presented for the jury to decide;

2. That the court erred in considering merely the sales of agricultural lands to support the order and judgment, the lots in question being admitted by the parties to be residential and commercial lots;

3. That the court erred in not evaluating the testimony of the expert witnesses presented by the defendants and the testimonies of the other defendants' witnesses concerning the values of lands which are close to the lots in question;

4. That the order and judgment are against the weight of or contrary to the evidence;

5. That the amount awarded in the judgment is not the fair value or just compensation of the lots in question on the date of vesting, that is, April 11, 1949;

6. That the credibility of the witnesses and the

weight of their testimonies are for the jury and not for the court to determine.

Wherefore, it is most respectfully prayed that this motion be granted.

Agana, Guam, Marianas Islands, 22 April, 1957.

REYES & LAMORENA,

/s/ By V. C. REYES,

Attorneys for Tracts 2, 4 & 15.

Notification

To: Olen W. Burnett, Assistant United States Attorney, Attorney for the Government, and Joaquin C. Arriola, Attorney at Law, Attorney for Tract 5:

Please take notice that on Friday, May 3, 1957, at 9:30 A.M. at the courtroom of the District Court of Guam, Guam Congress Building, City of Agana, Guam, or as soon thereafter as counsel can be heard, the undersigned will present and argue the foregoing motion.

Dated: 22nd April, 1957.

REYES & LAMORENA,

/s/ By V. C. REYES,

Attorneys for Tracts 2, 4 & 15.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

MINUTE ORDER

May 3, 1957

Government appears by Olen W. Burnett, Assistant United States Attorney.

Reyes and Lamorena appear in interest of Tracts 2, 4 and 15. J. C. Arriola appears in interest of Tract 5.

Having heard the arguments of the attorneys for the respective parties, Ordered that Motion to Set Aside Order and Judgment and for New Trial be and hereby is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Manuel C. Blas, owner of Tract 2, Part of Lot 1074, and the Estate of Jose Martinez Torres, owner of Tract 4, Part of Lot 1089 and Tract 15, Part of Lot 1075, two of the defendant-owners of the lands above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the District Court of Guam granting the Motion for Directed Verdict promulgated in open court on April 8, 1957, the Judgment entered on April 12, 1957, and the Order promulgated in open court on May 3, 1957, denying the Motion for New Trial.

Agana, Territory of Guam, 26th June, 1957.

REYES & LAMORENA,
/s/ By ALBERTO T. LAMORENA,
Attorneys for Appellants Manuel C. Blas and the
Estate of Jose Martinez Torres, Deceased.

[Endorsed]: Filed June 26, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF
TRANSMITTAL

I, Roland A. Gillette, Clerk of the District Court of Guam, in and for the Territory of Guam, M.I., do hereby certify that the following documents, to-wit:

1. Declaration of Taking, filed April 11, 1949,
2. Complaint in Condemnation, filed April 11, 1949,
3. Amended Complaint, filed May 13, 1949,
4. Order of Court, entered and filed May 13, 1949,
5. Motion for Judgment on Declaration of Taking, filed August 18, 1949,
6. Judgment on Declaration of Taking, entered and filed August 18, 1949,
7. Order transferring action to District Court of Guam, entered and filed December 22, 1950,
8. Petition for Order and Order extending Order of Removal, filed and entered June 22, 1951,
9. Amended Declaration of Taking, filed September 15, 1952,

10. Judgment on Amended Declaration of Taking, entered and filed September 15, 1952,

11. Second Amendment to Complaint, filed September 15, 1952,

12. Notice, filed September 15, 1952,

13. Disclaimer Lot 1074-3 Barrigada, filed September 17, 1952,

14. Answer Lots 1069-3 & 1075 Barrigada, filed October 7, 1952,

15. Answer Lot 1074-3 Barrigada, filed October 7, 1952,

16. Petition for Advance Withdrawal Lot 1069-3, Tract 4, Barrigada & Order of court entered and filed February 5, 1953,

17. Notice of Motion for Pre-Trial Conference and Trial Tracts 4, 15 & 2, filed December 20, 1956.

18. Pre-Trial Order, entered February 4, 1957,

19. Deficiency Judgment, entered and filed April 12, 1957,

20. Motion to set aside Order and Judgment and for New Trial, filed April 22, 1957,

21. Receipt for \$3,903.43, filed June 11, 1957,

22. Notice of Appeal, filed June 26, 1957,

23. Appeal Bond, filed June 26, 1957,

24. Defendants' Designation of Record on Appeal, filed July 17, 1957,

25. Government's Designation of Record of Appeal, filed July 25, 1957,

26. Ex Parte Motion for Extension to and including September 17, 1957, filed August 2, 1957,

27. Order extending time, entered and filed August 2, 1957,

28. Stipulation for Omission of papers from record on Appeal, filed August 22, 1957,

29. Clerk's Minutes,
are the original documents or true copies thereof filed with the clerk of the Court in the above entitled cause.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M.I., this 18th day of November, A.D., 1957.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Agana, Guam—April 8, 1957

Appearances: For the Plaintiff Olen W. Burnett, Assistant United States Attorney, Attorney for the Plaintiff. For the Defendants: V. C. Reyes, Attorney-at-Law and Alberto Lamorena, Attorney-at-Law, Attorneys for the Defendants Blas and Torres.

Trial by Jury

The Court: This is a civil case of the United States of America vs. 380,438 square meters of land, Civil Case No. 6-49. Are you ready in this case?

Mr. Lamorena: Yes, your Honor.

The Court: Are you representing all of the defendants?

Mr. Lamorena: Yes, sir.

The Court: Is the Government ready?

Mr. Burnett: Yes, sir.

The Court: Will counsel sign the pretrial order?

(Both counsel signed the pretrial order).

The Court: Good morning ladies and gentlemen, I want to explain to you that the action before you this morning is a condemnation case. As you know, the United States of America or the Government of Guam have the right to take private property for public purposes. When the government takes private property for public purposes or condemns it, the government is obligated to pay the property owners just compensation for that property at the time it is taken. Now the procedure is this: If the government requires private property, in this case land in the municipality of Barrigada was taken, the government causes an appraisal to be made of the value of that land at the time it is taken as in this case in 1949. Based upon that appraisal, the government then pays into court the amount of money represented by the appraisal. The individual land owner then has one of the three alternatives assuming that no question is presented as to the right of the taking as there is no question in this case. The former land owners did not question the authority of the government to take the land. The land owner then may agree with [1]* the government as to the value of the land and later enter into a stipulation. When that is done,

* Page numbers appearing at top of page of Reporter's Transcript of Record.

the land owner is paid and that disposes of that particular land. The land owner may withdraw the amount of money which the government has paid in, assuming that the title is clear, and reserve his right to have the question of just compensation determined by the jury. When that is done, the jury then determines what amount of just compensation should be paid to the land owner. If the jury finds that that amount is greater than the government has paid in, the land owner is then entitled to the difference between what was paid in and what the jury finds to be the value and obtains interest on that sum from the date of the taking in 1949. If the jury finds that the government has paid in more than the land is worth and the land owner has withdrawn the amount, then the land owner must pay back into the fund the overage. Of course, the third situation is that in which the land owner does not care to withdraw the money but leaves it in the possession of the court until the court or jury has determined just compensation. Therefore, this morning, your responsibility or the responsibility of the jury finally selected in this case will be to determine the just compensation which should be paid for the taking of four parcels of land in the municipality of Barrigada. In cases of this kind, the burden is upon the defendants, the former land owners, to show the amount of damage in terms of just compensation. While the United States Government is the plaintiff in the sense that it brought the condemnation action and ordinarily the plaintiff must carry

the burden of proof. In condemnation, the converse is true and the defendants must show by a preponderance of the evidence, as the court will define such terms to you subsequently, that the amount paid in by the government does not represent just compensation. [2] Obviously in getting jurors, twelve jurors to pass upon the question of just compensation, jurors should be unprejudiced as between the land owners and the government and should not have any pending claims of their own which would prejudice them against the government. Call the jury.

Mr. Reyes: We represent, your Honor, tracts No. 2 and 5 but Mr. Arriola is supposed to represent tract No. 5.

The Court: What about tract No. 5, is it in the same general location?

Mr. Reyes: Yes, sir, it is in the immediate vicinity.

The Court: Now, we have two alternatives, one of them is to eliminate tract No. 5 this morning and handle that in connection with some other action or, of course, since there was no motion, your evidence this morning will govern. Call the jury.

The Clerk: Number 44, Marcial S. Sablan; Number 32, Joseph Drennan Manibusan; Number 19, Dorothea Garrido Sgambelluri; Number 14, Rosa Teresita Salas; Number 20, Tomasa Pereira Leon Guerrero; Number 15, Francisco G. Guma-taotao; Number 2, Joaquina Munoz Santos; Number 33, James Philip Lomax; Number 21, Alfred Santos Rios; Number 24, Ignacio Perez Quitugua;

Number 12, Juan Cruz San Agustin; Number 23, Luis Torres Martinez.

(Jurors sworn.)

The Court: Mr. Sablan, as I pointed out to you, this is an action in which the government has condemned land in the municipality of Barrigada. The former property owners are represented by Judge Reyes and Mr. Lamorena. The government is represented by the Assistant United States Attorney, Mr. Burnett. Now, do you know Judge Reyes or Mr. Lamorena?

Mr. Sablan: I know Mr. Reyes and Mr. Lamorena. I have seen him a couple of times but I have never met him. [3]

The Court: Do you know Mr. Lamorena?

Mr. Sablan: I have seen him.

The Court: You have no prejudice by virtue of your acquaintance with Judge Reyes?

Mr. Sablan: No.

The Court: Does your immediate family have any claims against the United States?

Mr. Sablan: Not at all.

The Court: Do you know of any reason, Mr. Sablan, why you could not sit as a fair and impartial juror and determine the value of this land according to the evidence presented to you?

Mr. Sablan: No, sir.

The Court: Thank you.

The Court: Mr. Manibusan, do you know Judge Reyes and Mr. Lamorena?

Mr. Manibusan: Yes, sir.

The Court: Judge Reyes related to you in any way?

Mr. Manibusan: No, sir.

The Court: Does he handle any legal work for you?

Mr. Manibusan: No, sir.

The Court: You would have no prejudice toward the government by virtue of the fact that you know Judge Reyes?

Mr. Manibusan: No.

The Court: Do you know the Assistant United States Attorney, Mr. Burnett?

Mr. Manibusan: No, sir.

The Court: Do you or your immediate family, Mr. Manibusan, have any claims against the United States resulting from land takings?

Mr. Manibusan: Yes. [4]

The Court: Have they been settled?

Mr. Manibusan: No, sir.

The Court: You have some claims open?

Mr. Manibusan: I have about six hectares of land that is still condemned.

The Court: Six hectares that are still subject to settlement as to the amount?

Mr. Manibusan: Yes, sir.

The Court: I think we will excuse you, sir. Call another juror.

The Clerk: Number 25, Helen Mae Morgan.

(Mrs. Morgan sworn.)

The Court: Mrs. Morgan, you probably know Judge Reyes?

Mrs. Morgan: I am acquainted with him.

The Court: Has he or Mr. Lamorena ever represented you in any legal matters?

Mrs. Morgan: No, your Honor.

The Court: Do you know the Assistant United States Attorney, Mr. Burnett?

Mrs. Morgan: I have met him.

The Court: Do you or your immediate family have any claims pending against the United States?

Mrs. Morgan: No, your Honor.

The Court: Do you know of any reason, Mrs. Morgan, why you could not sit as a fair and impartial juror and do justice between the government and the former land owners?

Mrs. Morgan: I do not.

The Court: Thank you very much.

The Court: Mrs. Sgambelluri, do you know Mr. Lamorena or Judge Reyes? [5]

Mrs. Sgambelluri: Your Honor, there is some relation between myself and Mr. Reyes.

The Court: Do you know the Assistant United States Attorney?

Mrs. Sgambelluri: No, your Honor.

The Court: Do you or any member of your immediate family have any claims against the United States?

Mrs. Sgambelluri: No, sir.

The Court: You know of any reason, Mrs. Sgambelluri, why you could not sit as a fair and impartial juror and determine the value of this land according to the evidence that is presented to you?

Mrs. Sgambelluri: No.

The Court: Thank you very much.

The Court: Mrs. Salas, you do know Judge Reyes?

Mrs. Salas: Yes, your Honor.

The Court: Is that merely an acquaintanceship?

Mrs. Salas: Friend of the family.

The Court: Is there any relationship with Judge Reyes?

Mrs. Salas: Yes.

The Court: How close is that relationship?

Mrs. Salas: He is my brother's godfather.

The Court: Do you feel that that would prejudice you in any way in passing upon this case, after all, this case is simply a question of doing justice between the government and the land owners based upon the evidence?

Mrs. Salas: No.

The Court: Do you know the Asistant United States Attorney?

Mrs. Salas: No, your Honor.

The Court: You know of any reason why you could not sit as a fair and impartial juror in this case? [6]

Mrs. Salas: No.

The Court: Do you or any of your immediate family have any claims pending with the United States Government?

Mrs. Salas: My father has.

The Court: He has some unsettled claims against the government?

Mrs. Salas: Yes.

The Court: I think we will excuse you. Call another juror.

The Clerk: Number 27, Jesus B. Leon Guerrero.

(Mr. Guerrero sworn.)

The Court: Mr. Guerrero, do you know Judge Reyes and Mr. Lamorena?

Mr. Guerrero: Yes, your Honor.

The Court: Is that an acquaintanceship only?

Mr. Guerrero: I believe he is a relative of mine.

The Court: Is that a fairly close relationship?

Mr. Guerrero: Not too far, not too close.

The Court: Has Judge Reyes ever represented you in any legal matters?

Mr. Guerrero: None.

The Court: Do you know the Assistant United States Attorney, Mr. Burnett?

Mr. Guerrero: Never met him.

The Court: Do you or does any member of your family have any claims against the United States still unsettled as a result of land takings?

Mr. Guerrero: My father had but it is closed.

The Court: Are those claims open?

Mr. Guerrero: No, he accepted it; he didn't make contest.

The Court: But he settle with the government?

Mr. Guerrero: He did.

The Court: Do you feel that he settled for less than the land was worth or something like that?

Mr. Guerrero: I am not sure.

The Court: Do you feel that you would be in any way prejudiced?

Mr. Guerrero: I regret to say, yes.

The Court: We will excuse you. Call another juror.

The Clerk: Number 43, Antonio Manibusan Palomo.

(Mr. Palomo sworn.)

The Court: Mr. Palomo, you know Judge Reyes and Mr. Lamorena and you know Mr. Burnett?

Mr. Palomo: Yes, sir.

The Court: Do you or any member of your family have any unsettled claims against the United States?

Mr. Palomo: My mother and my uncle. There has been a judgment passed to accept it.

The Court: Do you remember whether they settled it?

Mr. Palomo: Actually it is not a matter of settlement. They didn't take the money and they didn't fight it.

The Court: Do you feel that there would be some questions as to the amount received as fair value of the property?

Mr. Palomo: According to some of them; according to others, it is a matter of——

The Court: You are familiar with this type of case. Do you feel that if you were selected as a juror that you would be able to do justice between the land owners and the government?

Mr. Palomo: Well, I don't, judge. I might be prejudiced.

The Court: Very well, you may step down. Call another juror. [8]

The Clerk: Number 36, Ruby Ines Hubbel.

(Mrs. Hubbel sworn.)

The Court: Mrs. Hubbel, do you know Judge Reyes?

Mrs. Hubbel: Yes, I do.

The Court: Has Judge Reyes ever handled legal matters for you?

Mrs. Hubbel: No, sir.

The Court: Mr. Lamorena has not handled any?

Mrs. Hubbel: No, sir.

The Court: You know the Assistant United States Attorney, Mr. Burnett?

Mrs. Hubbel: Yes, sir.

The Court: Do you or any member of your family have any claims against the United States resulting from land takings?

Mrs. Hubbel: No, sir.

The Court: Do you know of any reason why you could not sit as a fair and impartial juror in this case and do justice according to the law and the evidence?

Mrs. Hubbel: No, your Honor.

The Court: Thank you very much.

The Court: Miss Leon Guerrero, you know Judge Reyes and Mr. Lamorena?

Miss Leon Guerrero: I know Judge Reyes.

The Court: Is he related to you in any way?

Miss Leon Guerrero: No, sir.

The Court: Has he handled any legal work for you or your family?

Miss Leon Guerrero: No, sir.

The Court: Do you or any member of your im-

mediate family have any unsettled claims against the United States resulting [9] of land takings?

Miss Leon Guerrero: No, sir.

The Court: You know of any reason why you could not sit as a fair and impartial juror to determine the value of this land according to the law and evidence?

Miss Leon Guerrero: No, sir.

The Court: Thank you very much.

The Court: Mr. Gumataotao, you know Judge Reyes and Mr. Lamorena?

Mr. Gumataotao: Yes, your Honor.

The Court: You are not related to Judge Reyes?

Mr. Gumataotao: No, sir.

The Court: Do you know the Assistant United States Attorney, Mr. Burnett?

Mr. Gumataotao: Yes, your Honor.

The Court: Just from seeing him?

Mr. Gumataotao: Yes, your Honor.

The Court: Do you or any member of your immediate family have any unsettled claims against the United States resulting from the takings of land?

Mr. Gumataotao: Yes, your Honor.

The Court: You yourself or your family?

Mr. Gumataotao: Yes, sir.

The Court: You yourself have unsettled claims?

Mr. Gumataotao: My family.

The Court: Is that your father?

Mr. Gumataotao: My father and my mother.

The Court: They have claims that have not been settled?

Mr. Gumataotao: Yes, your Honor.

The Court: Very well, you may step down, Mr. Gumataotao. [10] Call another juror.

The Clerk: Number 34, Jesus Espinosa.

(Mr. Espinosa sworn.)

The Court: Mr. Espinosa, do you know Judge Reyes or Mr. Lamorena?

Mr. Espinosa: Yes, sir.

The Court: Do you know the Assistant United States Attorney?

Mr. Espinosa: I know him now.

The Court: Do you or your immediate family have any unsettled claims against the United States as a result of land takings?

Mr. Espinosa: No, sir, none.

The Court: You have none?

Mr. Espinosa: No, sir.

The Court: You know of any reason why you could not sit as a fair and impartial juror in this case?

Mr. Espinosa: No, sir.

The Court: You know of any reason why you could not do justice here?

Mr. Espinosa: No, sir.

The Court: Thank you very much.

The Court: Mrs. Santos, do you know any of the counsel here, Judge Reyes, Mr. Lamorena or the Assistant United States Attorney?

Mrs. Santos: I know Mr. Reyes. He used to be my school teacher.

The Court: You are not related to him?

Mrs. Santos: No, sir.

The Court: If in fact he was your school teacher, it would not prejudice you in determining the issues in this case?

Mrs. Santos: No, sir. [11]

The Court: Do you or any member of your immediate family have any unsettled claims against the United States from land takings?

Mrs. Santos: Yes, sir, my father has three.

The Court: He has three claims that have not been settled?

Mrs. Santos: No.

The Court: There are some still open?

Mrs. Santos: Yes.

The Court: You may step down. Call another juror.

The Clerk: Number 10, Leocadio Bautista.

(Mr. Bautista sworn.)

The Court: Mr. Bautista, do you know Judge Reyes or Mr. Lamorena?

Mr. Bautista: Yes, sir.

The Court: Is Judge Reyes related to you in any way?

Mr. Bautista: Friends.

The Court: Has he handled any legal work for you?

Mr. Bautista: No.

The Court: Do you know the Assistant United States Attorney, Mr. Burnett, the attorney for the government?

Mr. Bautista: No, sir.

The Court: Do you, Mr. Bautista, or any member of your immediate family have any claims

against the United States resulting from land takings?

Mr. Bautista: No.

The Court: Do you know of any reason why you could not sit as a fair and impartial juror and determine the issues according to the evidence?

Mr. Bautista: No, sir.

The Court: Thank you very much. [12]

The Court: Mr. Lomax, you probably know Judge Reyes and Mr. Lamorena?

Mr. Lomax: Yes, sir.

The Court: You also know the Assistant United States Attorney?

Mr. Lomax: Yes, sir.

The Court: You have no claims against the United States?

Mr. Lomax: No, sir.

The Court: Do you know of any reason why you could not be a fair and impartial juror in this case?

Mr. Lomax: No, sir.

The Court: Thank you very much.

The Court: Mr. Rios, do you know Judge Reyes or Mr. Lamorena?

Mr. Rios: Yes, I do.

The Court: Is he related to you in any way?

Mr. Rios: No, sir.

The Court: Is that merely an acquaintanceship?

Mr. Rios: Yes, sir.

The Court: He hasn't handled any legal work for you?

Mr. Rios: No, sir.

The Court: You know Mr. Lamorena?

Mr. Rios: Yes, sir.

The Court: Is that also an acquaintanceship?

Mr. Rios: Yes, sir.

The Court: Do you know the Assistant United States Attorney, Mr. Burnett?

Mr. Rios: No, sir.

The Court: Do you or any member of your immediate family have any unsettled claims against the United States?

Mr. Rios: Yes, sir. [13]

The Court: Who is that?

Mr. Rios: My father and mother.

The Court: Those cases have not been settled?

Mr. Rios: Yes, sir.

The Court: Very well, you may step down. Call another juror.

The Clerk: Number 29, Cynthia Ruth Olson.

(Mrs. Olson sworn.)

The Court: Mrs. Olson, do you know Judge Reyes or Mr. Lamorena?

Mrs. Olson: I know Judge Reyes.

The Court: That is merely an acquaintanceship?

Mrs. Olson: Yes, sir.

The Court: He hasn't handled any legal work for you?

Mrs. Olson: No, sir.

The Court: You know Mr. Burnett, the Assistant United States Attorney?

Mrs. Olson: Yes, sir.

The Court: That is also an acquaintanceship?

Mrs. Olson: Yes, sir.

The Court: You have no claims against the United States?

Mrs. Olson: No.

The Court: You know of any reason why you could not sit as a fair and impartial juror in this case?

Mrs. Olson: No, I don't.

The Court: Thank you very much.

The Court: Mr. Quitugua, do you know Judge Reyes and Mr. Lamorena?

Mr. Quitugua: I do.

The Court: Is Judge Reyes related to you in any way? [14]

Mr. Quitugua: He married my distant auntie.

The Court: You do not feel that that would prejudice you in this case?

Mr. Quitugua: No.

The Court: Do you or any member of your immediate family have any unsettled claims against the United States?

Mr. Quitugua: There is a piece of a lot here in Agana, passed Route 4, which is still in question.

The Court: It still hasn't been closed?

Mr. Quitugua: The government is paying rent for it.

The Court: This is just a leasehold taking?

Mr. Quitugua: Yes.

The Court: Not a fee simple taking?

Mr. Quitugua: No.

The Court: Do you feel that you would in any way be prejudiced in this case in passing upon the question of just compensation?

Mr. Quitugua: No.

The Court: You would be governed entirely by the law and the evidence?

Mr. Quitugua: Yes, sir.

The Court: Thank you, sir.

The Court: Mr. San Agustin, do you know Judge Reyes or Mr. Lamorena?

Mr. San Agustin: I know Judge Reyes a little bit.

The Court: Either one of them handle any legal work for you?

Mr. San Agustin: Well, last week I handed a probate case to Mr. Lamorena which belongs to my father-in-law.

The Court: Did not involve you?

Mr. San Agustin: No. [15]

The Court: Do you or any member of your immediate family have any unsettled claims against the United States?

Mr. San Agustin: I don't know exactly, Judge.

The Court: Do you know of any reason, Mr. San Agustin, why you could not sit as a fair and impartial juror in this case?

Mr. San Agustin: I don't know.

The Court: Thank you very much.

The Court: Mr. Martinez, do you know Judge Reyes?

Mr. Martinez: Yes, your Honor.

The Court: Is he related to you in any way?

Mr. Martinez: No, your Honor.

The Court: Does he handle any of your legal work?

Mr. Martinez: No, your Honor.

The Court: You know Mr. Lamorena?

Mr. Martinez: Yes.

The Court: Same thing true of him?

Mr. Martinez: Yes, sir.

The Court: And you know the Assistant United States Attorney?

Mr. Martinez: No, sir.

The Court: Mr. Martinez, do you or any member of your immediate family have any unsettled land claims against the United States?

Mr. Martinez: I don't; my father has a piece of land down by the Piti Power Plant; how it stands, I don't know. I have no idea, sir.

The Court: You think, Mr. Martinez, you would be governed solely in this case by the law and evidence?

Mr. Martinez: Yes, sir.

The Court: Very well, the defense may examine the jury.

Mr. Lamorena: No examinations. [16]

The Court: Government may examine.

Mr. Burnett: No questions.

The Court: The twelve jurors now in the box are passed for cause by both sides?

Mr. Lamorena: Yes, your Honor.

Mr. Burnett: Yes, your Honor.

The Court: Defenses' first challenge?

Mr. Lamorena: Waive our first challenge.

The Court: Government?

Mr. Burnett: No challenge.

The Court: Both sides accept the jurors, twelve jurors, in the box?

Mr. Lamorena: Yes, sir.

Mr. Burnett: Yes, your Honor.

The Court: Swear the jury.

(Jury sworn by clerk.)

The Court: May I say to the remainder of the panel, you will be excused until next Monday morning at 9:30 a.m. You may remain, of course, if you wish, but you may leave. Defenses' opening statement. We will first take our ten-minute recess at the present time. The jurors will file out.

(Whereupon a ten-minute recess was taken by the court.)

10:35 a.m. Trial resumed.

The Court: The parties stipulated that the map marked Government's Exhibit 1 may be admitted in evidence as a correct drawing, drawn to scale, of the land areas involved in this particular case. Now, do you wish to make opening statements?

Mr. Reyes: Yes, your Honor. [17]

Opening Statements

Mr. Reyes: Ladies and gentlemen of the jury, this morning we are interested in the determination of the market value of three tracts of land in the Barrigada Village at the present time. These tracts of land are comprised of 1074, 1075 and 1069. Here is (pointing) Route No. 8 going to Barrigada and over here (pointing) is Route No. 10 going to BPM down to Yona. I am sure you have a clear view of

the place. Now the United States Government offered a price for the condemnation of these tracts of land. The offer was from——

Mr. Burnett: I object to going into such matters. Those are not relevant.

The Court: We can go into the question of offers. It is an offer made, an attempt to compromise.

Mr. Reyes: Your Honor, but I wanted to show how much the government offered to pay for this and why we are contesting it.

The Court: Offer to pay but you are talking of the government's original appraisal, is that correct?

Mr. Reyes: The government's appraisal was for a 1 6/10 to 2 9/10 per square meter of this property. We contend that this property cost considerably more and we will try to show it to you why this property cost more. For your examination and understanding this cardboard here represents one square meter of measure. In land this is one square meter. Thank you.

Mr. Burnett: Ladies and gentlemen, I have only a few words to say at this time. We are not concerned with what the government's appraisal originally was or anything other than the one in question of what is fair and just compensation for the United States to pay for the land. That is what we are concerned [18] with today. Mr. Reyes has pointed out to you already the lands involved on this map. Those lands were taken by the United States as part of the village of Barrigada. You may recall that during the war there was a great deal

of destruction, great deal of displacement of people, great deal of destruction of homes and after the war the United States set out to provide dwelling places, places for those left homeless to live in, and as part of that program, there was taken by the United States, land including that shown in red on the map, for the establishment of the village of Barrigada. That is the land we are concerned with now. You are not concerned with original appraisals or anything but a simple question of what is the just compensation the United States should pay for the taking of that land. All I am here to do is to present for your information and consideration the best evidence which we have been able to gather bearing upon the question, what was the fair market value of each of the tracts of land at the time it was taken and when that evidence has been received, all we ask for the government is that you consider the evidence and if you arrive at a verdict that you bring back fair and just verdicts determining what the fair market values of the land involved were. That is the only thing we are concerned with and that is all I can say to you.

Mr. Reyes: These tracts of land were taken by the government on April 11, 1949. [19]

JOSE C. MANIBUSAN

called as a witness hereby and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Reyes): Will you kindly state your name, your address and your occupation?

(Testimony of Jose C. Manibusan.)

A. Jose Camacho Manibusan, Leyang Barrigada, Chief Judge of the Island Court of Guam.

Q. Do you own any real properties in Guam?

A. Quite a few, yes, sir.

Q. Where are these properties located?

A. Sinajana, Barrigada, just those two.

Q. Barrigada comprises a lot of territory, will you be more specific as to the locations of your places in Barrigada, there are several places?

A. In Barrigada, it is 1100-1 in the BPM area, Lot No. 5372 in Sinajana, that will be Lots 135 and 152 that is in Chochogo and Mapas, Sinajana.

Q. Chochogo and Mapas?

A. That is right.

Q. Do you know the location, the general location of the tracts of land designated as Lots 1074, 1075 and 1069 in Barrigada village?

A. If you are referring to the property of J. M. Torres in Barrigada and Manuel C. Blas, I know the location because it is located by the road going from Agana to my property in Leyang.

Q. Lot 1074 is the property of Manuel C. Blas?

A. Yes.

Q. And 1075 and 1069 were properties owned by the late [20] J. M. Torres? A. Yes, sir.

Q. Your property in Sinajana or Chochogo, how is it related or how is it situated in relation to these tracts of land?

The Court: I don't understand what Judge Manibusan's land in Sinajana has to do with the land in Barrigada.

(Testimony of Jose C. Manibusan.)

Mr. Reyes: I am trying to find out the distance between his land in Barrigada and his land in Sinajana to the land now in question.

Mr. Burnett: It has nothing to do with the issue here.

The Court: What would be the relationship? What we are concerned with now is the land in Barrigada. There is quite a little distance between Barrigada and Sinajana.

Mr. Reyes: It is just an imaginary dividing land.

Q. (By Mr. Reyes): What is dividing your property between Sinajana or Chochogo to this area now known as Barrigada?

A. There are quite a few properties in between. If you refer to the district, Barrigada joins Sinajana and it is only divided by a roadway, we call it Canada Road.

Q. What is the distance between your Chochogo property and your Barrigada property that we are now talking about?

A. Going by automobile it would be about two and a half miles; by straight line, I would say about a mile or so.

Q. What is the distance between this Barrigada property and your Leyang property?

A. It is about a mile and a half by the road; a mile straight.

Q. Were these properties in Barrigada, Lots 1074, 1075 and 1069, adjoining any highway in 1949? [21]

(Testimony of Jose C. Manibusan.)

The Court: Now you continue to refer to lot numbers. The land in question, Judge Manibusan, is marked in red on the chart here.

A. From my own memory, I think there is a road, rather these (pointing) were roads.

The Court: Just refer to the chart as much as you want.

Mr. Burnett: We can save a little time. I will admit that Lot No. 1069 abuts Route 8 with a smaller area on Route 10. Lot No. 1074 abuts Route 8 and 1075 was an interior lot.

The Court: I think the question primarily is that Route 8 and 10 as now were in existence from 1949.

A. They were there.

Mr. Reyes: Is that stipulated?

Mr. Burnett: Yes.

Q. (By Mr. Reyes): Your property in Chochogo, Sinajana, Guam which is about two miles from these tracts was it in '49 or prior to '49 utilized in a similar situation as it is now?

Mr. Burnett: I will object to that. I don't see any relevancy in any way.

The Court: Yes, the question before Judge Manibusan is what were these lots used for at the time of taking in connection with 1949, not what the lots are used for now.

Mr. Reyes: I am trying to show the similarity of the two places with regards to location, situation and the residential advantages. I am not going into

(Testimony of Jose C. Manibusan.)

the market value of the place, just the comparison of the two.

Mr. Burnett: I don't think it is relevant.

The Court: I am afraid it is. Judge Reyes, Judge Manibusan testified about the three different properties. Of course, we [22] know that his own residence is not located on either one of these main highways, either Route 8 or 10. I don't see what you are getting at in terms of these particular properties. In other words the question is what is the value of these properties as of the time that they were taken, April 1949, not the value of his property because they may have a number of deficiencies.

Q. (By Mr. Reyes): In '49 or before '49, do you know what uses were made of the properties in question? A. The Torres and Blas?

Q. Yes.

A. I thought the village was there.

Q. The village was there? A. Yes.

Q. Was there a church or churches?

A. There was one church.

Q. Was there or were there stores or business establishments?

A. I wouldn't be sure about that.

Q. Was there a school or schools on the property?

A. I presume the Barrigada school was on the property and still is.

Q. Living in that area, do you know if there were any water facilities up there in 1949?

(Testimony of Jose C. Manibusan.)

A. I wouldn't say that. I wouldn't say whether there was any water then but if I remember correctly, these people were served with water from the wagon.

Q. Do you know how much the lands in Barrigada or that area were selling for in 1949?

A. I wouldn't be in a position to say that Mr. Reyes as I have never had any deal in that area but in my own place. So [23] my answer is I had no deal in any of the places or around that place.

Q. You mentioned that Barrigada, the Barrigada properties now under controversy or in controversy were used as a residential area in 1949. Was any of your property used for the like nature?

A. No, not in that area.

Q. Not in that area, but was your property utilized as such?

A. That would be in the BPM area but that is quite a distance away.

Q. How about your property in Chochogo?

A. That is a distance away, Mr. Reyes, about two miles away. If you want me to testify about that, I will, but it is quite a distance away, it is about one or two miles away.

Q. Will you kindly tell the court and the jury the general economic condition of the people of Guam in 1949?

A. What way, Mr. Reyes?

Q. Did they have money to buy properties or the like?

A. I think they had.

Q. And in cash?

A. Money, in cash.

(Testimony of Jose C. Manibusan.)

The Court: We should bring out whether this was agricultural land, or what.

Mr. Reyes: That is all.

Cross Examination

Q. (By Mr. Burnett): Judge Manibusan, I have only a very few questions. Now the Blas and the Torres properties which you referred to, is it [24] true that those were agricultural lands prior to the establishment of the village of Barrigada?

A. I think they were with the exception that in the Blas property, there was a house built on it.

Q. Well, I mean principal use of the property was for farming, it was not subdivided for residential?

A. No, it was for farming before the war.

Q. And up until the establishment of the village of Barrigada, is that correct? A. Yes, sir.

Q. That is all three of the lots concerned which we are speaking about? A. Yes, sir.

Q. It was the establishment of the village of Barrigada by the government rehabilitation program that changed this property to village or residential property, is that right? A. Yes, sir.

Redirect Examination

Q. (By Mr. Reyes): Do you know when the village of Barrigada was started?

Mr. Burnett: I object. It is entirely irrelevant.

The Court: Overrule the objection. Now, are you talking about when the village of Barrigada was originally established?

(Testimony of Jose C. Manibusan.)

Mr. Reyes: Yes.

Mr. Burnett: I would like to comment very briefly. Apparently counsel is trying to learn what was taken.

Mr. Reyes: What was taken in 1949? It was the village.

Mr. Burnett: These lands were all leasehold condemnations [25] from 1946 until fee was taken. The basis of evaluation is of farm land. Therefore, I object to the question, that is completely irrelevant.

The Court: I think the jury should be instructed as to the value of the property for its best possible use at the time of taking. The question is in 1949, in April, when you took the land, what was the development?

Mr. Burnett: Well——

The Court: It is your contention that if you lease the property for three years, that the value at the time you take it is the value at the time it was originally leased.

Mr. Burnett: The land is considered as if on the date of taking it was in the same condition as it was at the time of the lease.

Q. (By the Court): Before the war, was there a village of Barrigada?

A. It was further up.

Q. These lands that we are discussing were not included in the village? A. No.

Q. As result of the war and the resettlement of

(Testimony of Jose C. Manibusan.)

the people then the present village of Barrigada was established by the government?

A. Yes, sir.

Q. And these lands were taken as part of the lands——

A. That is right, sir.

Q. Prior to that time, sir, they were available for use for agricultural purposes and not residential?

A. I was trying to remember. There was a building there which used to house the police. I thought there was a little store. [26]

The Court: That is, of course, something that has to be developed, but not by Judge Manibusan's testimony, that it was at the time it was taken agricultural property before the war. I think you have everything from Judge Manibusan, whether it is material or not.

Mr. Reyes: Yes, sir.

Mr. Burnett: The development occurred during the period when the lands in question were under leasehold condemnation and after they were taken into possession by the United States, they were used for commercial and residential purposes when the fee was taken. I will agree to that.

The Court: Very well, are you through with Judge Manibusan?

Mr. Reyes: I have a few questions to ask him, please.

Q. (By Mr. Reyes): Judge Manibusan, prior to 1949, did you make any sales of real property?

A. Not prior to 1949 but during 1949.

(Testimony of Jose C. Manibusan.)

Q. What were your sales?

A. To tell you the truth there was quite a demand for land at the time and some of the people that were displaced, little further up around Fifth Field area, I let these people live there for some time in 1949 when the property was leased to me and offered to me to buy the place where the houses are on.

Q. How much?

Mr. Burnett: I will object.

The Court: Where is that place?

A. In Chochogo, one or two miles apart.

Mr. Reyes: Your Honor, the judge's land is around here (indicating on the map) somewhere.

Mr. Burnett: Are you asking him whether he sold land in Chochogo?

Mr. Reyes: Yes. [27]

Q. (By Mr. Reyes): What was the price of the land? A. From \$200 to \$500.

Q. How big?

A. I wouldn't say that because it is subdivided but it is enough for a house to stand on.

Q. In other words a house lot between \$200 to \$500?

A. I am not going to be definite because I allowed them to build in between houses.

Q. What was your price then, prices ranging from \$200 to \$500, is that right? A. Yes, sir.

Q. For a house lot?

A. Let me correct you. This is not my price;

(Testimony of Jose C. Manibusan.)

I never wanted to give them my price; this is their offers.

Mr. Burnett: I object. I want the answer stricken unless it is related to an area because the offer——

The Court: I don't think you are talking——

Mr. Reyes: But if evidence of offers were to be received, it would be necessary to know if the offer was made in good faith by a man of good judgment, acquainted with the value of the property and of ability to pay; whether the offer was for cash or for consideration in exchange and whether met with reference to the market value of the property.

The Court: You haven't laid the ground work. Judge Manibusan says he cannot because he was dealing on a highly personalized basis because of their need.

Mr. Reyes: It was not counted by any particular need; it was just a voluntary offer on the part of the tenants.

Mr. Burnett: Any offer is entirely hearsay. [28]

Mr. Lamorena: If your Honor, I believe it is not an offer. Those were paid to the judge. An offer is one which is not a consideration unless accepted.

The Court: That is my understanding, certain house lots, the areas of which he does not know because they were subject to subsequent subdivision, from \$200 to \$500.

Q. (By Mr. Reyes): Regarding the areas, Judge Manibusan, was it not agreed between you and these tenants that they would occupy only the

(Testimony of Jose C. Manibusan.)

yards or the yardage or the area occupied by the house?

A. In order to answer that, I may read the receipt. On 21st of February, 1949, the spouses Jose Camacho Manibusan, C. I. #253 and Maria Espinosa Manibusan, C. I. #254 receive the sum of Five Hundred Dollars (\$500) from the spouses Jose Manibusan Cruz, C. I. #3113 and Ana Cruz, C. I. #1552, for which we promise to sell a portion of Lot 152, Chochogo, Sinajana, Guam, where their house and that of their son Enrique Cruz Cruz stands, as indicated to them personally by the undersigned today. Regular request and deed of sale would be made upon subdivision of said lot, which will be at the expense of the Cruzes. This portion is the northeastern portion of said Lot 152, as far as about five (5) feet south of the present house of Enrique on the east and as far south as the lot line north of the Hannahs' house on the west, and the new road. It is bounded on the North by the property of Antonio L. G. Blas, on the East by the property of Jose F. Perez formerly a trail, on the South by remaining portion of Lot 152, and on the West by the remaining portion of Lot 152 and that of the property of Antonio L. G. Blas.

Q. (By the Court): Was that when they were subdivided? [29]

A. No, I asked the people to go ahead with the subdivision. This is merely allowing them to live on the property without charge, otherwise, if I had to charge \$5.00 a month, it would be \$60.00 a year.

(Testimony of Jose C. Manibusan.)

Q. (By Mr. Reyes): Do you have an approximate area of the place?

A. No. My whole property is about five hectares and the space occupied by these people is merely about one or two hectares.

Q. About how many people?

A. About eight or nine houses.

Q. Eight or nine houses on the two hectares?

A. About that, I am not certain.

Mr. Reyes: That is all, Judge, thank you.

The Court: Thank you very much, Judge. [30]

FRANK D. PEREZ

called as a witness hereby and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Reyes): Will you kindly state your name, your address and your occupation?

A. Francisco Duenas Perez, presently residing at Barrigada. My Post Office Box No. is 188 Agana, Guam. Occupation, presently engaged in business.

Q. You say you live in Barrigada, do you own the land on which you are living? A. Yes.

Q. Did you own this land before the war?

A. No.

Q. Now, do you own it?

A. I purchased this particular piece of property.

Q. From whom did you purchase it?

(Testimony of Frank D. Perez.)

A. From Francisco Martinez Camacho.

Q. Will you describe how big this property is?

A. The property that I purchased from him has approximately two hectares.

Q. And what did you pay for this property?

A. \$2300 cash.

The Court: It has not been established yet when it was acquired.

Q. (By Mr. Reyes): When was it acquired?

A. The early part of 1948, I believe it was around January.

Q. 1948? [31] A. Right.

Q. Is this vendor Francisco Martinez Camacho related to you?

A. He is my wife's uncle.

Q. Is he the brother of your wife's mother?

A. That is correct.

Q. How much did you pay per square meter?

A. With that figure, it would come out approximately \$.10 per square meter.

Q. Do you know the property of Manuel C. Blas, the property of J. M. Torres in Barrigada Village?

A. Yes, I know the properties but which specific ones?

Q. Lot 1074, Manuel C. Blas, Lots 1075 and 1069 belonging to J. M. Torres?

A. Yes, I know the property of 1074, that is Mr. Blas' property and 1075 and 1069 are Mr. Torres' properties in Barrigada.

(Testimony of Frank D. Perez.)

Q. How far away is your land located from him?

Q. (By the Court): You also know 1068?

A. 1068 must be adjoining property to Mr. Torres. I will look at the map.

Q. (By Mr. Reyes): Will you go to the map and show the distance between your property you bought from Mr. Camacho and the properties now in consideration?

A. That property is located here (pointing) about 200 meters here. The nearest property there is from Lot No. 27 to 1069 according to the scale given me which represents one inch to 20 meters. The distance then from that property to 1069 on the junction is 200 meters to the junction. [32]

Q. When you bought this property in January 1948, Lot 1087 was there. Any improvements such as structures?

A. No, there was not a single improvement at the time I purchased the property. It was bare land.

Q. Do you know if there was any improvement or improvements on Lots 1074, 1075, 1069 and 1068?

A. Yes.

Mr. Burnett: Objection, it is entirely irrelevant.

The Court: Objection will be overruled. Your question is were there any improvements on these lots that are in question now in 1948?

A. Yes, there were improvements in the area that you just asked me about. The improvement

(Testimony of Frank D. Perez.)

that I know of was that Route 8 was there, or, in other words, a road was in existence.

Q. (By Mr. Reyes): How about Route 10?

A. So was Route 10 installed or constructed by that time in 1948.

Q. (By the Court): Was there any water?

A. Water in the vicinity only. The only water that I know in the area was the water furnished by the military but no permanent installation in 1948.

Q. No buildings?

A. In my lot 1063, there were buildings but what I said was there was no government water in 1948 other than water supplied by the military in temporary nature.

Q. (By Mr. Reyes): In 1948 were there people living in these properties now under consideration? [33]

A. Yes.

Q. Was there a church on this property?

A. If I remember correctly, the Catholic church was already on that part of that property.

Q. How about schools?

A. Also the public school as far as I can remember. Right in the center of the village itself, there was a school and still there is a public school.

Mr. Reyes: That is all. Thank you, Mr. Perez.

Q. (By the Court): You mean these buildings were put up after the war?

A. That is right, your Honor.

Q. In connection with the village?

A. In connection with the subdivision of the vil-

(Testimony of Frank D. Perez.)

lage by the military in order to place our people in the village organized by the government.

Q. In 1946 the government started using this land for the resettlement of people that had to be evacuated from other places? A. Correct.

Q. In connection with that resettlement, houses such as these were rebuilt and school houses and churches and so forth? A. That is correct.

Q. If you remember correctly, how were people put in this village, were people just permitted to move into those places without paying rent at that time?

A. In the village itself that was the original subdivision prepared by the government. It was under the control of the government and no person, resident or citizen of this territory may move into the building without first getting a permission or arrangement with the military Welfare Department and they also [34] have a requirement, an experience of myself, that you cannot be given a lot and the building in Barrigada unless you have at the time three dependents, so I was disqualified for not having any children at the time.

Q. The government then permitted the people to occupy these residences? Did they rent it from the government?

A. That I do not know whether they pay rent to the government. I don't know for sure whether they paid rent for the use of the government land but at a latter date, the properties were sold to the people residing in those buildings.

(Testimony of Frank D. Perez.)

Q. But the immediate approach of the government was to provide shelter for the people who had been in need of shelter?

A. That is correct.

The Court: Thank you, Mr. Perez.

Cross Examination

Q. (By Mr. Burnett): As I understood you, Mr. Perez, Route 8 and 10 were both constructed prior to the construction of the village, is that true?

A. No, I didn't say it was constructed prior to the village but it is safe to assume. You must have an access. I say it was there in 1948 because when I bought this property I passed through Route 8 and 10.

Q. I am not sure I understood you. You said there was a building on Lot 1069 at the time you bought your property in 1948, is that correct?

A. Yes.

Q. I am not entirely clear whether you are speaking of [35] only Lot 1069 or all three of the lots including 1074?

A. I was speaking of all of the lots in question and including the other lots, subdivision of Barri-gada.

Q. The buildings including the school and the church of which you referred, building constructed by the military as part of the development of the village?

A. It is safe to assume that the military still have complete jurisdiction over the resettlement of

(Testimony of Frank D. Perez.)

the people of this territory and it is safe to assume that the military were the only people here putting up the buildings then.

Q. And they are the ones you said were occupied by just placing people in them with their dependents? A. Yes.

Q. And, of course, other buildings have been put up by individuals; individual owners putting up their own stores. The government's primary duty was to provide shelters for the needed families and all other buildings such as commercial ones were erected by the individual owners? A. Yes.

Q. You spoke, Mr. Perez, of buying this piece of land in 1948. Do you remember the exact date?

A. I did not check on the exact date but if my memory is correct, it is around the 13th of January, 1949.

Q. Can you say whether or not it is 1948?

A. Yes.

Q. You bought it from Mr. Camacho?

A. That is correct.

Q. That lot lies on Route 10?

A. That is correct.

Q. Do you know the percentage on Route 10?

A. If the information you gave me that one inch equals 20 meters then that frontage is three inches or sixty meters, that is the frontage of Lot 1070.

Q. If I remember correctly, you said the area of Lot 1087 was approximately two hectares, can you state the exact area?

A. I do not have the records with me but it is

(Testimony of Frank D. Perez.)

two or little more than two hectares. That is the property I bought from Mr. Camacho.

Q. Is it 36,700 square meters?

A. That was for the whole piece of property including the other side of the road and including that portion occupied by Route 10 and the purchase from Mr. Camacho was the property not counting Route 10 and the remaining of the property on the other side of the road.

Q. In other words 36,000 square meters is the entire lot? A. That is correct.

Q. You bought part of it, is that correct?

A. Right.

Q. Did you ever buy other property in that vicinity? A. Not at Barrigada, no, sir.

Q. Did you ever sell any property in that vicinity prior to 1949? A. No, sir.

Mr. Burnett: Thank you. [37]

MR. EDUARDO CALVO

called as a witness hereby and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Reyes): Will you kindly tell the court and the jury your name, your address and your occupation?

A. Eduardo T. Calvo, my occupation is an Insurance Agent and Real Estate Broker, Maite, Barrigada.

(Testimony of Eduardo Calvo.)

Q. Do you own any real properties in Guam?

A. I do.

Q. Will you kindly tell the court where these properties are located?

A. I have properties in Asan, Barrigada, Sinajana, Agana Vista, Epan, Agat, Tamuning and Agana.

Q. Do you own any property in Barrigada?

A. I do.

Q. Are you familiar with—do you have any knowledge of land values in Guam?

Mr. Burnett: I object, it is entirely too general.

The Court: Do you have any experience in land values?

Q. (By Mr. Reyes): What was your occupation before World War II?

A. I was Assistant Cashier for the Bank of Guam.

Q. Did you deal with land matters or real estate matters before the war?

A. Yes, good deal of my work entails the inspection of real properties being pledged for security with the bank.

Q. Did this give you any familiarity of the prices in Guam at the time? [38]

Mr. Burnett: Objection to that line of questioning as of prices before the war.

The Court: I think it is clear to the jury that as an Assistant Cashier, he had to pass upon collateral as regards security by lands. Now during this experience and on up to date——

(Testimony of Eduardo Calvo.)

Q. (By Mr. Reyes): Mr. Calvo, what are the circumstances or elements you consider in the determining the value of land?

Mr. Burnett: I must object to that. It calls for conclusion of the witness on the question of law.

Q. (By the Court): Mr. Calvo, did you acquire your land at Barrigada after the war or before the war?

A. I owned it before the war but I have bought lots in Barrigada, various properties since the war.

Q. (By Mr. Reyes): And since the war have you had occasion to make appraisals of property for purposes of investment or otherwise?

A. I note in an official capacity but as real estate man naturally I am interested in the overall values of land in the island and also for a while, I was a member of the Equalization Board of the Government of Guam and had occasion to study and make a survey of land values in Guam.

Q. Are you familiar with this, in general, with land values in Barrigada as of April 1949?

A. Yes, in a way.

The Court: Now, your question, Judge Reyes, is what does an appraiser take into consideration in determining the value of land, is that correct?

Mr. Reyes: Yes, sir. [39]

The Court: Then he may answer that question.

A. According to my understanding and experience with regard to determining land values, these are the pertinent factors in determining the land values and fair market value: (1) Sale price agreed

(Testimony of Eduardo Calvo.)

on between a willing buyer and seller, (2) potential or real economic rental value to the owner or prospective buyer, (3) productive value of the land or use, (4) location of the property. This directly affects the value of property, urban, rural or farm property, all have different values. The availability and accessibility to highways, streets, electric power, water system, temporary schools, churches, markets, telephones and fresh water streams, all affect the actual value of the land. Other things affecting the value are intrinsic as view, temperature, acreage, elevation, steepness of slope and drainage, (5) land use-adaptability and the need for such use at the time of the purchase. This is the general standpoint of government's appraisal. I have made also a study of gathering land information. This is the manual for real property assessment by the government of Guam compiled by the real estate experts of the Jacobs and Company. Sales market data from records of present sales offers asking prices and opinions pertaining to land values. Two, data and opinions on land development trends and uses particularly in new and dormant subdivisions or commercial centers. Three, rental data for use in estimating land value according to the residual process. Four, information regarding neighborhood and condition affecting the values and stability of real property in such areas. Five, unit land values recommended by information from citizens and property owners. These are the basic factors for tax assessment purposes. [40]

(Testimony of Eduardo Calvo.)

Q. (By Mr. Reyes): Mr. Calvo, do you know a place called Barrigada Village? A. I do.

Q. When was this village established and what date did the people start coming into this village?

A. According to my knowledge and also by confirming with the Chief Commissioner of Guam, the village was established in 1945 and 1946.

Q. In 1949 was Barrigada Village a going concern, was it an organized community?

A. Yes.

Q. Were there any churches, schools and stores at that time?

A. Yes, in 1949 Barrigada was already an organized community. Of course, even before the war, Barrigada was a town. You have a commissioner there and you have people living in Barrigada and you have a school house. You have a church; you have an artesian well. That is even before the war, Barrigada was a town.

Q. The village of Barrigada of today is right next to Route 8, do you know when it was constructed?

A. As long as I can remember, even during the existence of the organized village of Barrigada which was in 1945 or 46, Route 8 and Route 10 were there. That is the road to BPM Camp.

Q. Do you know where lots 1074, 1075 and 1069 and 1068 are located?

A. Yes, I know; they are located in the organized village of Barrigada.

(Testimony of Eduardo Calvo.)

Q. Do you know if they have any accessibility to any road?

A. Yes, Route 8 and you have the village roads here.

Q. Do you know if there were any stores, schools and [41] churches on Lots 1075, 1069, 1074 and 1068?

A. Yes, there was a church; there were stores, barber shops, liquor stores and pool halls.

Q. How would you then classify Lots 1074, 1075, 1068 and 1069? A. As to what date?

Q. In 1949?

A. I will classify them as commercial and residential property.

Q. Do you know whether there was any wide differences in the best possible use of these lands in Barrigada between 1941 and April 11, 1949?

A. Definitely, I would certainly say that there was quite a revolutionary change of 1069, 1075 and 1074 since 1941 and at the time the land was condemned in 1949. By that, I mean, the agricultural utilization in 1941 is completely changed to a different use or classification by actual and mere utilization of the lands into commercial and residential uses by the people of Barrigada.

Q. Now, what would be, in your opinion, the fair market value of lots 1069, 1075 and 1074 in 1948 per square meter?

Mr. Burnett: I object on the ground of lack of foundation.

(Testimony of Eduardo Calvo.)

The Court: Objection overruled. He may answer.

A. First I would like to make this observation and also this remark.

Mr. Burnett: I suggest that he should answer the question only.

The Court: I think you should answer the question, Mr. Calvo.

A. Judging from information that I have received and [42] compiled, lands which were formerly agricultural and now utilized for residential purposes, I would say that, and also the fact that in 1948, the Naval Government of Guam was charging \$.02 per square foot for warehouse space which was destroyed by typhoon. In Asan, Agana and Barrigada, I would say a house lot in 1949 is worth \$500 which is 5,000 square feet or an equivalent to \$1.00 per square meter. These are based from actual purchases which I made in 1948 in Sinajana and Agana Vista. The purchases also made in Tutujan, sold by Jose M. Cruz to Rosalia Ojeda in 1949 and to Vicente Munoz, \$1.00 per square meter and also the purchase from Jose M. Cruz, Lot 22-6 to Dominga S. San Nicolas. The George Washington High School was appraised by the government in 1950 at \$1.00 per square meter. Those factors were combined and also my knowledge that Judge Manibusan was being offered in 1948 and 1949, properties which were not comparable, in the neighborhood of \$250 to \$500 per lot. That is how I arrived at the price of \$500 in Sinajana, I mean in Bar-

Testimony of Eduardo Calvo.)

igada. The fact that the land was, in 1949, commercial and residential lots and not agricultural land. That is the basis of my appraisal.

The Court: We have reached the time for the noon recess, so the court will recess until 1:30 this afternoon. Mr. Calvo, of course, will return in connection with the cross examination. Ladies and gentlemen of the jury, your caution during the recess and at all times not to discuss this case among yourselves or to permit anyone else to discuss it with you. Keep your minds completely open until the evidence is in on both sides. That caution will be observed at all times while you are out of the courtroom until the case is given to you for your decision. The court will now recess until 1:30 this afternoon.

(Whereupon a noon recess was taken by the court.) [43]

1:30 p.m.—Trial resumed

(After recess.)

The Court: It is stipulated that the jurors are in place.

Mr. Burnett: If the court pleases, I would like to renew the objection I previously made as to the last testimony of opinions of value given by Mr. Calvo on the ground that it completely lacks foundation. Mr. Calvo testified as to his opinion of values of the lots in question of 1068, 1069, etc.

The Court: That will be overruled.

Mr. Burnett: And I move that it be stricken.

(Testimony of Eduardo Calvo.)

The Court: It will be overruled.

Cross Examination

Q. (By Mr. Burnett): Mr. Calvo, I have only a couple questions. You testified that there was a very great change in use of lots 1068, 1069, 1074 and 1075 between 1941 and 1949. Isn't it true that the change in use occurred after World War II?

A. Right.

Q. So that during World War II to the extent that these lots were used, they were used for agricultural purposes, isn't that correct?

A. Yes and no. The occupation by the Japanese forces in Guam in 1942 brought about also a change in the habits of living of the people of Guam. Prior to the war, the people of Guam were more or less city dwellers. They were all living in Agana. You will see now what we have—now the condition existing regarding with the dormant development of Agana.

Q. What I am getting at is that the principal use of these [44] lots during the war was for farming purposes, although the owners may have evacuated?

A. There is also that change since 1941, the people were forced by the Japanese to scatter all over their properties in Barrigada and being close proximity to Agana, people went out and built their permanent homes. There were a lot of people living in Barrigada during the occupation of the Japanese. There is also the fact that they have been

(Testimony of Eduardo Calvo.)

indoctrinated in the value in living in an open area where it is healthful, where the land is also elevated and it has been proven by the naval authorities before the war that the more elevation — the higher the elevation in which you live in Guam the less humidity you will have.

Q. What I am asking you is what was the principal use of lots 1068, 1069, 1074 and 1075, was it agricultural during the war?

A. Yes, because agriculture remains the occupation of Guam.

Q. The principal use of those four lots was agricultural until the village of Barrigada was established? A. Right.

Q. The present village of Barrigada was established after the war, wasn't it? A. Right.

Q. And initially the layout of its streets were made finally by the military or Naval Government of Guam, was it not? A. Right.

Q. And originally the dwellings were built by the military?

A. Yes and no because some people, before the military controlled, those lands there, were living around that area surrounding the area where Barrigada village was not made available to the people.

Q. What I am asking about lots 1068, etc., and even 1075 [45] taken by the Naval Government of Guam is a part of the permanent side of the village of Barrigada. The development of those lots was made by the military, was it not?

A. Definitely.

(Testimony of Eduardo Calvo.)

Q. The development of those lots and the establishment of the permanent site of the village of Barrigada was rehabilitation to provide homes for the people, isn't that true? A. Yes.

Q. I have just one other question, Mr. Calvo. You testified that there was prior to the war a town of Barrigada, and I ask you to step down to the map and point out the boundaries of the town of Barrigada which you said existed before the war?

A. I don't know whether it is located here but I know it is located where Barrigada, beyond the junction there on Route 10 and Route 8, that is where the old Barrigada Village was situated.

Q. Does it show on that map?

A. I can't tell here. I would say towards this area (pointing).

Q. How much area did it occupy?

A. That I don't know but there was quite a community. There was a schoolhouse; there was a church; there was an artesian well.

Q. How many people were living in that town?

A. If I had known you were going to ask me that question, I can make inquiry.

Q. Can you say approximately?

A. No, I wouldn't guess.

Q. How much area was called the municipality of Barrigada, not the town, not the village. How large an area is that?

A. In square miles? [46]

Q. Yes.

A. Well, I don't know. I can't tell you offhand

(Testimony of Eduardo Calvo.)

because there is also some confusion about the boundaries of Sinajana and Barrigada.

Q. Just approximately, please. We don't have to be too exact, just approximately?

A. Again I wouldn't gamble.

Q. Do you know what the prewar population of the entire municipality of Barrigada was?

A. Six or eight hundred.

Q. Including those in the town?

A. Right.

Mr. Burnett: Thank you, Mr. Calvo.

Redirect Examination

Q. (By Mr. Reyes): Mr. Calvo, the construction of Route 8 and Route 10, do you know if those big highways were constructed for the purpose of enhancing the value of the lands in Barrigada or was it for some other purposes?

A. I can only say that it was constructed for defense purposes and it was not constructed for rehabilitation purposes.

Q. Can you think of any reason why those tracts of land, 1074, 1068 and 1069 should be or maybe were classified as agricultural land in 1949?

A. The most possible and evident reasons I can think of how these lands, lots 1069, 1074 and 1075 could have possibly been classified as agricultural land by any land appraiser in 1949 can be attributed as follows: (1) First that these lands were classified in 1941 for tax purposes as agricultural land; [47] (2) that the land appraisers may have been

(Testimony of Eduardo Calvo.)

very much influenced by their appraisals in 1946 which by law, that is the Guam Meritorious Act, allowing property owners who were deprived of the use of their lands from 1944 to 1946 to claim compensation only from the Federal Government for the use of their lands on the basis of the land evaluation of their properties in 1941. These 1946 appraisals of land evaluation by 1941 standards may have been carried over or used in 1949 to arrive at the evaluation of the lands in question. That there may have been a misunderstanding on the part of the land appraisers in 1946 who were only allowed by law to use the 1941 land values for the 1944 to 1946 appraisals in granting and paying compensation for loss of use of properties during the period 1944 to 1946 and the interests of property owners which entitled land owners for properties or land taxed subsequent to 1946 to a fair market value or just compensation at the time of the taking which in this case was in 1949 and not in 1946——

Mr. Burnett: I object to assuming facts that are not in evidence, away from all of the issues of the case. I object to any continuation of the line of questioning.

The Court: Well, the question was not objected to until this time. I will permit Mr. Calvo to finish his answer.

A. You will find that there were a little appraisals of these lands in 1949 as to the best possible use at the time of taking in 1949. Because of this factor

(Testimony of Eduardo Calvo.)

of the 1946 appraisals which allowed only property owners to use 1941 values. That is how I can answer why it was classified as agricultural land is the fact that it must be a misunderstanding because 1946 or 1941 uses of that land was different than in 1949 which was the time that we are now trying to determine the fair market value.

Mr. Reyes: Thank you, Mr. Calvo. [48]

Q. (By the Court): Now, Mr. Calvo, I would like to ask you a question to clarify this picture. In 1941, except for people who settled during the war in that general area, this land was agricultural land, is that correct? A. In 1941?

Q. Yes, except for those that you mentioned that moved out of Agana or possibly moved out by the Japanese?

A. Yes, the greater portion of it was used for agricultural land but like I say, your Honor, in 1941 there was already a schoolhouse in Jalaguac which is a part of Barrigada where the Naval Air Station and another school in Barrigada itself. The town of Barrigada and in 1942 when the Japanese occupied Guam, the people scattered all over their lands in Barrigada. I cannot visualize if those lands were made available in 1945 or 1946, whether the people will again organize because there was already an organized community in Barrigada in 1942.

Q. During the process of return of the Armed Forces in Guam, the city of Agana which has been the residential center of Guam was already com-

(Testimony of Eduardo Calvo.)

pletely destroyed? A. Right.

Q. The Armed Forces were being confronted with the fact that large numbers of people had completely lost their homes and had no place to live? A. Right.

Q. And those were largely in the City of Agana?

A. Right.

Q. Coincidentally with that, the Naval Government of Guam was thinking at least in terms of rebuilding Agana as a model city and had a master plan within the frame work of that master plan [49] even if people were able to rebuild Agana, they were not able to do so, were they?

A. There was some rebuilding, those who actually stayed in Agana but the fact that the naval authorities wouldn't allow them.

Q. The naval authorities wouldn't allow anything except the master plan that was being put in effect?

A. It took an act of congress to get them out of their properties but another thing, your Honor, that I will like to point out is the fact that the people in Agana had homes in Agana, lands in Barrigada or Sinajana during the Japanese occupation or more or less have two homes, one in Agana and one in Barrigada.

Q. Now they were confronted with the necessity of reestablishing people, as I understand it, in the town or village of Barrigada. Of course the government proceeded to lay out roads and to take over lands and to build housing for people?

Testimony of Eduardo Calvo.)

A. Right.

Q. And then the people settled there and there has been very little change from that day until today?

A. Right.

Q. Including the use of this land for that purpose, now that was done in '45 and '46?

A. That is right, but on the other hand, your Honor, where places are comparable in Barrigada, where the naval authorities did not hold back their hands, you find people going out there without any subdivision to establish their homes, their like, for instance, Agana Heights was not an organized community before the war. Sinajana outside the village, yes, you will find people.

Q. From the standpoint of real estate, if a person builds a home in a rural area that doesn't make it a residential property, does it? [50]

A. No, but when you find so many people moving into one area, becoming organized, they were starting an organized community, for instance, Agana Heights.

Q. But this development in Barrigada was almost entirely due to the fact that the government had made facilities in Barrigada?

A. Right.

The Court: Thank you very much, Mr. Calvo.

Mr. Reyes: Defense rests. [51]

JOSE L. G. BITANGA

called as a witness hereby and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Burnett): Will you state your name, address and occupation?

A. Jose L. G. Bitanga, Sinajana, Appraiser for the Department of Navy.

Q. How long have you been an appraiser for the Department of the Navy?

A. Way back in 1940 to 1946. At present I am an appraiser for land condemnations.

Q. Since 1946 you had been employed?

A. Employed by the Land and Claims Commission.

Q. You mean in 1946 you were employed by the Land and Claims Commission and since that time you have been employed by the Area Public Works or Base Development?

A. After the Land and Claims, Base Development and then the Area Public Works Office.

Q. Before your employment as an appraiser with the Land and Claims Commission, what work did you do?

A. Naval Government appraiser for tax purposes, for real estate property for the Island of Guam.

Q. For how long? A. Since 25 to 30 years.

Q. During the time you have been so employed as an appraiser in connection with real estate be-

(Testimony of Jose L. G. Bitanga.)

fore the war with the Naval Government and since the war with the Land and Claims Commission, have your duties required you to be thoroughly familiar with the lands in Guam? [52]

A. Yes, sir.

Q. Will you state whether or not you have traveled around the island looking at properties?

A. Every three years we visit each and every property in Guam.

Q. Was that prior to the war?

A. Prior to the war.

Q. And since the war, did you as an appraiser travel around the island looking after these properties?

A. January, 1945, yes, the military government started the real estate appraisals in 1945 up to June when we completed it.

Q. And since then you have been an appraiser with the Navy. Didn't that job require you to go around looking at various properties?

A. Yes.

Q. In the course of going around Guam looking at individual properties, Mr. Bitanga, did you have occasion to look at and become familiar with the lots in Barrigada? A. Which lot?

Q. Well, first, just in general, were you familiar in general with lots or lands in Barrigada?

A. Each and every lot as I stated before that we visited every three years.

Q. Were you then before the war familiar with lots 1068 or 1069, 1074 and 1075?

(Testimony of Jose L. G. Bitanga.)

A. Yes, sir.

Q. Were you familiar with those lots during the war? A. During the Japanese?

Q. Yes.

A. I can't say because I was never there during the [53] Japanese occupation. I was confined at the city of Agana.

Q. Were you again familiar with those four lots after the war? A. Yes, sir, in 1945.

Q. Prior to the war, Mr. Bitanga, what use was made of lot 1068?

Mr. Lamorena: We object to the line of questioning, your Honor, of the value of the land in 1941 or any time before the war.

The Court: Objection overruled.

Q. (By Mr. Burnett): What was the use of lot 1068 prior to the war?

A. Agricultural land.

Q. How about 1069? A. The same.

Q. 1074? A. The same.

Q. 1075? A. The same.

Q. How about after the war, can you say whether or not all four of those lots were used for agricultural purposes?

A. After the war, part——

Q. After the war and before the establishment of the village of Barrigada?

A. Before the establishment, it was still farm land, somebody living there farming. All the naval government was making was a subdivision for the new village of Barrigada rehabilitation.

Testimony of Jose L. G. Bitanga.)

Q. Before that subdivision of the village of Barrigada, that was farm land? A. Yes.

Q. Do you remember, Mr. Bitanga, when that village of [54] Barrigada was established, what date?

A. Sometime in 1945 when the military government bulldozer started working there, making the streets and roads for the village.

Q. What village, who built the houses?

A. The military government.

Q. In other words the village had existed in April, 1949. Was the village built by the military government, is that right?

A. That is right.

Q. Do you know approximately what was the population of the municipality of Barrigada before the war?

A. Eight hundred or more, little bit more, around eight hundred or more.

Q. Was there a town of Barrigada before the war? A. Never been a town or village.

Q. Was there a school and a church there?

A. There was a school and also a church.

Q. Where were they to the present school?

A. Very far up in the Radio Barrigada.

Q. North or East from where the village is now?

A. Lot 2238 where the San Roke Chapel is located and 22 or 5-1, 206-3 and 2205 where the school, Barrigada school is located.

Mr. Burnett: I have no further questions.

(Testimony of Jose L. G. Bitanga.)

Cross Examination

Q. (By Mr. Lamorena): May it please the court, ladies and gentlemen of the jury, Mr. Bitanga, you said that there was no village nor town called Barrigada before the war? A. No.

Q. When you say village, what is the picture of a village? [55]

A. Subdivision, an organized community, just subdivision houses and roads.

Q. Did you say how many schools were at Barrigada before the war?

A. You cannot call that——

Q. How many schools there were in Barrigada?

A. There were two schools, three schools within the radius of Barrigada municipality—one in Barrigada, one in Price and another one in Tijan it Maite or Mapas.

Q. How many churches were there?

A. One chapel, that is San Roke Chapel in Barrigada.

Q. How many people living within the vicinity of the school and the church?

A. All the people are living within the radius of Barrigada district, eight hundred or eight hundred and fifty, something like that.

Q. Are you taking it partly or just casually that go there and come to live in Agana whenever they want to?

A. They are living in their ranches and sometimes they come downtown once a month.

Q. Did they have houses there?

Testimony of Jose L. G. Bitanga.)

A. They have houses and properties.

Q. Are those houses well built or were they hacks?

A. Some have shacks, some concrete building and some with iron roof.

Q. Isn't it a fact that there were some concrete buildings there before the war?

A. Some, in fact, Joaquin Rabon have concrete.

Q. How about the Cepedas?

A. They have buildings with iron roof. [56]

Q. With all those facts presented, would you not consider that place as a village before the war?

A. No.

Q. But you said that you do not consider that place as a village because there was no subdivision, what do you mean by a subdivision?

A. Blocks and lots for building, that is subdivision and houses are gathered in one place and road, that is an organized village. You cannot call that organized village, country—houses living in the wrong property. Every house is about 500 meters apart; the closest neighbor is around 45 meters.

Q. Do you know a place called Barrigada?

A. No.

Q. Municipality of Barrigada?

A. Only in 1925 or '27 when they appointed a commissioner of Barrigada.

Q. I mean was that place called Barrigada?

A. Yes.

(Testimony of Jose L. G. Bitanga.)

Q. When a place is called a municipality, could it be a village or town?

A. No, not necessary to have town to call municipality.

Q. I invite your attention to see the lots in question, by looking at lot 1075 and 1069 or I would rather say dividing lots 1075 and 1069 and crossing on the North of Lot 1074, what is that tracing down there (pointing) represent?

A. What do you mean?

Q. This one (pointing to the chart)?

A. Price road cutting through the property of Torres.

Q. What? A. Canada road. [57]

Q. Well developed road before the war?

A. Just ten feet wide.

Q. Motor vehicles before the war passed through that place? A. Yes.

Q. Judge, you said that Barrigada was being taken for purposes of rehabilitation, am I right?

A. That is right.

Q. You said that you worked for the Navy for quite a long period of time as an appraiser, is that right, Judge? A. Yes, sir.

Q. And you said that 1074, 1075, 1069 and we shall also include 1068 for purposes of this question were all agricultural properties before the war? A. That is correct.

Q. In 1949, April 11, Judge, what was the best available use of these four lots?

Mr. Burnett: Objection.

(Testimony of Jose L. G. Bitanga.)

Mr. Lamorena: Very pertinent, your Honor.

The Court: Before January, 1949?

Mr. Lamorena: April, 1949, I am asking what kind of properties?

The Court: Objection overruled.

A. It was taken by the military government for rehabilitation purpose to house those people, lots of families were in small shacks in Bradley Park, some in Finele, Agat.

Q. (By Mr. Lamorena): My question is simple, Judge. On April 11, 1949, will you kindly state to the jury what were the uses of these four lots in question?

A. It is already organized village by the military government. [58]

Q. Shall we also consider it as part commercial because there were business establishment also?

A. Just some stores that they put up, stores and poolhalls.

Q. (By The Court): Judge Bitanga, what was the value of these properties before the government started developing these lots?

A. \$100 to \$200 a hectare.

Q. \$100 to \$200?

A. \$100 to \$200 together with the improvement, the retaking of the Armed Forces of the United States the Island of Guam.

Q. There are how many square meters in a hectare?

A. It is one hundred square meters in a hectare—10,000 square meters.

(Testimony of Jose L. G. Bitanga.)

Q. Do you mean then that the land at that time already was worth \$.01 to \$.02 per square meter?

A. Something like that.

Q. For agricultural purposes?

A. For agricultural purpose.

Q. (By Mr. Lamorena): What was the basis of your computation for telling the court the price per hectare in Barrigada is from \$150 to \$200?

A. A hectare, \$200 to \$300 a hectare. It all depends whether there is no improvement, \$100 or \$150.

Q. Is that all you took into consideration whether there was improvements or no improvements? A. Yes.

Q. Did you not consider in your computation the best possible use of the land at the time?

A. Yes, some built roads, water and land, telephone, some taken into consideration. [59]

Q. And you said that April 11, 1949, lots 1074, 1075, 1069 and 1068 were residential or commercial places at the time? A. Most——

Q. Poolhalls and business establishments——

A. That is in the village.

Q. When you answered the question of the court, were you basing it on the fact that they were previously agricultural lands?

A. Yes, previously agricultural lands.

Q. The basis then was merely agricultural?

A. Yes.

Mr. Lamorena: Thank you, Judge Bitanga.

The Court: Witness may be excused. Call your next witness. [60]

WILLIAM A. WOELFL

called as a witness hereby and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Burnett): Will you please state your name, address and occupation?

A. William A. Woelfl, 4015 Apra Heights. I am employed as a real estate appraiser, United States Navy.

Q. How long, Mr. Woelfl, have you been employed as a real estate appraiser for the Navy?

A. Since February, 1947.

Q. Prior to that what was your occupation?

A. Between the years 1924 and 1932, I was a real estate broker in New York. In 1932 I was employed by the Office of the Real Estate Expert for the City of New York and assisted in the preparation of cases for trial of all the properties taken in condemnation by the City of New York. From 1939 to 1947 I was employed by the Home Owners Loan Corporation of 2 Park Avenue, New York City. From 1939 to 1947 I made appraisals in the states of New York, New Jersey and Pennsylvania. In 1947 I transferred to the Department of Navy and arrived in Guam on the 13th of February, 1947.

Q. During the course of that experience, did you have occasion to appraise the different types of classification of real estate in different parts of the United States? A. I did.

(Testimony of William A. Woelfl.)

Q. And for what purpose did you make such appraisals for different kinds, I think you mentioned condemnation, did you make appraisals for any other purpose?

A. My appraisals determined the market value of various [61] city and country properties for the purpose of disposing of their repossessed properties. There was over two hundred thousand properties owned by the Home Owners Loan Corporation at that time.

Q. In other words since 1925, I believe you said, you have been engaged in the Real Estate appraisal business? A. That is right.

Q. In one way or another, as broker or appraiser for a Federal Agency or for the Navy?

A. That is right, since 1939 as an appraiser.

Q. Mr. Woelfl, would you say approximately how many tracts or parcels of real estate you have appraised in Guam?

A. I would say over 5,000.

Q. During your experience as appraiser, have you had occasion to testify as an expert witness on the values of the land in court? A. I have.

Q. Approximately how many times have you been so called upon to testify as an expert?

A. Offhand I couldn't say.

Q. Has it been often or only seldom?

A. Maybe three, four or five times here in Guam.

Q. How about before you came to Guam?

A. Yes.

(Testimony of William A. Woelfl.)

Q. Would you say whether or not, Mr. Woelfl, you made appraisals and made investigations of values in connection with the tracts we are now trying, the lands that were taken on April 11, 1949, did you make appraisals in that case?

A. I did.

Q. Did you make an investigation or appraisals to ascertain the values as to all of the lands taken in that case? [62]

A. I did.

Q. I will call your attention to specific parcels of land, Mr. Woelfl, tract No. 2 in this case which is four hectares plus 144 square meters of Lot 1074, Barrigada, did you make an investigation and an appraisal to determine the value of that tract?

A. I did.

Q. Tract No. 4 which is 7 hectares plus 2126 square meters of Lot 1069, Barrigada, did you investigate to make appraisal to determine the value of that land?

A. Yes, sir.

Q. Tract No. 15, consisting of 1 hectare plus 480 square meters of Lot 1075, Barrigada, did you make appraisal and investigate to determine the value of that tract?

A. Yes.

Q. And Tract No. 5, 3455 square meters of Lot 1068, Barrigada, did you make an investigation and appraisal to determine the value of that tract?

A. Yes, sir.

Q. In the course of your investigation and appraisal, Mr. Woelfl, did you make these investigations to determine whether they were in the vicinity that is close to Barrigada Village or whether

(Testimony of William A. Woelfl.)

there are voluntary sales of similar lands during the year 1948 or 1949, did you investigate; did you gather any information of such sales?

A. Yes, sir.

Q. How many sales did you find which in your judgment were usable for basis for evaluation?

A. Nine.

Q. Will you state for the court and the jury the basic information summarizing each of those sales and as you refer to [63] each sale, will you mark the map so that the jury may see where the sale was?

A. Yes, sir. Lot 1075, Place of San Antonio, Francisco M. Camacho to Francisco D. Perez. The original taking is 36,706 square meters consideration of \$2300. The date of the sale, January 13, 1948.

Q. Mr. Woelfl, let me ask you whether you examined the record of that transaction?

A. One of my staff examined it for me.

Q. Go ahead?

A. Lot 1100-1 sold by Francisco M. Camacho to Jose C. Manibusan, area of 24,980 square meters, \$1,000, per hectare unit price of \$400. The date of the sale was May 11, 1948. Lot No. 2304, Jose W. White and Jose Minor, 40,192 square meters, \$150. The date of the sale is July 17, 1948, unit price of \$37.00 per hectare. Lot 2294 Part, Place of Lalo, sold by Jose A. Minor to Manuel M. Santos, area of 4,382 square meters at \$200 on November 30,

(Testimony of William A. Woelfl.)

1948, unit price of \$450 per hectare. Lot 2233, place of Ungaguan, sold by Cristobal R. Santos to Tomas S. Tanaka, area of 41,047 square meters, sale price is \$200, sold on December the 10th, 1948, analyzing average price \$48.00. Lot 2427, Place of Corten Torres, sold to Peter Cruz, area of 45,000 square meters, consideration of \$1500, sold on December 22, 1948, average per hectare \$330. Lot 2087 sold by Jose Salas to Peter L. G. Guerrero, an area of 85,094 square meters, consideration was \$800, sold on December 30, 1948, cost per hectare, \$84.00. Lot 2294 Part, Lalo, same lot by Jose A. Minor to Juan C. Flores, area of 1918 square meters, sale price is \$200, sold on April 22, 1949, shows an average unit sale price of \$1,040 per hectare. Also another piece of 2294 Part, Jose Minor to Josefa Okada, area [64] of 1,465 square meters sold for \$100 on April 22, 1949, consideration of the average cost per hectare, \$680.

Q. Mr. Woelfl, are these sales which you have described all of the sales which you found in the vicinity which you considered usable as basis for opinion or evaluation of the lots in question?

A. Yes, sir.

Q. What was the average sale price of the land which land sold in the sales which you have found?

A. The average cost of the nine sales was \$230 for a hectare.

Q. Did you find the indication for the differences of values depending on roads and frontage?

A. Not consistently.

(Testimony of William A. Woelfl.)

Q. Would you say whether or not in your opinion land with road frontage has greater value?

A. Yes, sir.

Q. After your investigation were you able to form an opinion of the fair market value of each of these separate tracts as of April, 1949?

A. Yes, sir.

Q. In forming your opinion, Mr. Woelfl, would you say whether or not you evaluated land fronting on the road as higher land? A. Yes, I did.

Q. Approximately how far from the road did you go in? A. Fifty meters.

Q. One hundred seventy feet, approximately within 170 feet?

A. Roughly little less than that.

Q. What then, Mr. Woelfl, in your opinion was the fair [65] market value of the four hectares of Lot 1074 Barrigada? A. \$1220.00.

Q. What in your opinion was the fair market value of Lot 1069 Barrigada on April 11, 1949?

A. \$2,860.00.

Q. What unit evaluation did you use on that block?

A. \$600 for the frontage and for 190 coconuts, \$295.00.

Q. And the entire lot was \$360 per hectare?

A. \$360 for the entire parcel.

Q. What in your opinion was the fair market value on 11 of April, 1949 of the $\frac{1}{3}$ hectare, 3455 square meters of Lot 1068? A. \$225.00.

(Testimony of William A. Woelfl.)

Q. What unit evaluation did you make of Lot 1075?

A. \$250 per hectare and 65 coconut trees.

Q. That is on Route 8 and Route 10?

A. Yes. The total is \$565.00.

Q. What in your opinion was the fair market value on April 11, 1949 of the 3450 square meters taken of Lot 1068?

A. It was all valued at \$600 per hectare and four coconut trees I was giving \$20.00, the total was \$225.00.

Q. You say \$600 per hectare that is your unit evaluation, is that because all of that parcel was frontage?

A. Yes, sir.

Cross Examination

Q. (By Mr. Lamorena): Mr. Woelfl, inviting your attention to the first two sales at the bottom, closest to you, those are made on the 11th of April, 1949 and April 12, 1949 or on the same date and on the same month when these lots 1074, 1075, etc., were taken? May I [66] ask you this question, isn't it a fact that those lands I am referring to are purely agricultural lands?

A. You referred to 2294 Part, part of it was agricultural land but the area is so small in comparison to the other site sold for residential use for houses.

Q. Mr. Woelfl, on April 11, 1949, what was the use of Lot 1074, 1069 and portion of Lot 1060?

A. Part of the village of Barrigada.

(Testimony of William A. Woelfl.)

Q. Inviting your attention to 1087, do you mean to say that the road is still part of that lot?

A. Still under private ownership. I have a copy of the description with me and the description as recorded covers the entire lot.

Q. Do you know the relationship between the seller and the buyer in the Perez, Camacho case?

A. I think they are related by marriage of the grandchildren.

Q. With respect to Lot 1100-1 that was sold by the estate of P. T. Camacho to Judge Jose C. Manibusan, isn't it a fact that that was agricultural land only? A. Yes, sir.

Q. Referring to Lot No. 1074, one of the lands involved in this case, is it not true that it fronts Route 8? A. Yes, sir.

Q. Referring to Lot 1069, isn't it a fact that it also fronts Route 8 and 10?

A. Yes, they all front the road except the one lot.

Q. And the same holds true with Lot 1068?

A. Yes.

Q. Isn't it a fact, Mr. Woelfl, that Lot Nos. 1074, 1075 and 1069 had the benefit of a good road before the government condemned those properties, the old road which was used by the people before?

A. It was a narrow road.

Q. But it was quite a good road?

A. Yes, it was one of the main roads.

Q. In the course of your investigation with respect to sales, did you come across a sale made by

(Testimony of William A. Woelfl.)

the estate of V. P. Camacho to Juan Blas Manibusan and Ana M. Manibusan?

A. What was the Lot No.?

Q. It is Lot 1099-12.

A. Offhand, I couldn't say. I have the records in the office—several hundred conveyances.

Q. Did you investigate a sale in 1948 made by the estate of V. P. Camacho to Mr. Lorenzo Siguenza?

The Court: And where is the property located?

A. Located near the place where Judge Manibusan's property is located. I must give you the same answer. I couldn't rely on my memory. I found no consideration in the area.

Q. (By Mr. Lamorena): Did you also investigate, Mr. Woelfl, a sale made by a certain individual by the name of Joaquin Borja Santos in 1949 to Thomas Santos, the postmaster located in Barrigada?

A. I must give you the same answer.

Q. Mr. Woelfl, you said that Lots 1074, 1075 and 1069 were commercial and residential on April 11, 1949. Will you kindly explain to the jury why in 1949 you used units on Lot 1074 of 3200 square meters at the rate of \$600 per hectare and \$250 per hectare for the remainder when a sale in the same month represented \$1,040 per hectare on the sales map those appearing below the one closest to you in the map, why?

A. For the same reason, I didn't take the low

(Testimony of William A. Woelfl.)

sales that show on the map. I took an average of sales ranging from \$37 a hectare. [68]

Q. I invite your attention to Lot 1067 and Lot 1100-1—— A. Those units——

Q. Lot 2427, Lot 2304 and Lot 2234 as were sold in the year 1948, will you kindly tell to the jury the relative prices of lands from 1948 to 1949 by taking Lot 2294 on a proportionate basis?

Mr. Burnett: I object.

The Court: Objection sustained.

Q. (By Mr. Lamorena): Mr. Woelfl, from the taking you have made thereof, you will notice the increase of prices from 1948 to 1949, is that right?

A. No, there was no substantial increase. In fact I have sales in the early part of 1948. Prices were very inconsistent; they ranged from very low to high and came out to the value that represents the sale. It would be unfair to take high sales or extremely low. My approach is to try and strike an average which is what I have done.

Q. Was that your only support of the value represented by sales you considered in determining the values of Lots 1074, 1075 and 1069?

A. That is the best proof I know of.

Q. Did you consider the fact of the existence of Route 8 and 10?

A. I did, that is the basis of \$6.00 a unit.

Q. Mr. Woelfl, you said that you have had more than 5,000 cases of this kind? A. Yes, sir.

Mr. Burnett: No questions. Plaintiff rests.

The Court: Any rebuttal? [69]

Mr. Reyes: No rebuttal, your Honor.

The Court: I am going to excuse the jury until 9:30 tomorrow morning at which time you will hear final arguments and the instructions of the court in order that you may have more time in which to consider your verdict without being pressed for time. Please bear in mind the admonition of the court not to discuss the case among yourselves or permit anyone else to discuss it with you, so that any impression you receive will be based solely upon the evidence. The jury may now leave and we will meet again tomorrow morning at 9:30.

(Jury was excused at 3:00 p.m.)

Mr. Burnett: If the court please, I move the court to strike the opinion of values expressed by the witness Mr. Eduardo T. Calvo on the grounds that by his own testimony, Mr. Calvo did not show that he is a qualified witness to express those opinions and no foundation was laid of such knowledge as necessary to testify on his opinions of value of lands in question. I further move the court to direct a verdict based upon the testimony produced by the plaintiff's witnesses on the grounds that there has been no relevant presentation by the defendants to support a verdict. That motion is submitted with respect to all four of the tracts in question.

The Court: Your motion will be overruled or denied as to the question of Mr. Calvo's qualifying to testify but on the second part of the motion, there was nothing in any of the testimony intro-

duced on behalf of the defendants to enable this jury to determine values. Mr. Calvo did not break down these values according to lot, according to locations, according to being on the highway or not being on the highway. The only testimony that Mr. Calvo gave was that the property was worth \$1.00 per meter. [70]

Mr. Burnett: That is on the basis of the other lots.

Mr. Reyes: Mr. Calvo based his evaluation per square meter on the sales around the vicinity, the approximate places around this particular lot and he pointed out that these lots were residential in 1949.

Mr. Burnett: He testified as to lots in Sinajana, Agat and Agana Heights, values of commercial properties, not one particular lot involved was worth a particular sum of money, not with reference to any of the lots presented was there any evidence at all.

Mr. Reyes: He said these lots are and still are and shall not be given residential prices, I mean they were residential.

The Court: It should not be given as agricultural land. The government concedes that the testimony of the value is based upon the value of the lots on April 11, 1949 as residential, so the government is not insisting that these lots be valued for agricultural purposes. Mr. Woelfl's testimony is that they are residential and business. How do we expect the jury here in view of your evidence to be able to arrive at any verdict based upon, solely

pon the testimony based upon those witnesses. Your expert witnesses do not give any help, do not testify that these lots are worth any amount of money because they are on the road or on the corner or this lot is worth less because it is inside and it is not available for——

Mr. Reyes: I remember a question that was propounded to Mr. Calvo asking for his opinion and he testified \$1.00 on the lots 1069, 1074 and 1075.

The Court: I recall that Mr. Calvo used the only figure that of \$1.00, and it was not broken down into the different locations. [71]

Mr. Reyes: In 1949 that was a residential lot and it did not make any different, or much differences, whether it was fronting Route 8 or Route 10. They had all kinds of access inside the village.

Mr. Burnett: Are you trying to say that all lands in Barrigada are worth \$1.00 per square meter?

Mr. Lamorena: Yes.

The Court: You mean to say that this court could possibly uphold a jury verdict of \$4,100.40 for Lot 1074, Tract 2 or \$72,126, Tract 4 or part of 1069 for land that was agricultural admittedly taken by the government as a matter of rehabilitation and care for the hardship of our own people here.

Mr. Lamorena: I think that is for the jury to determine.

The Court: Based upon what?

Mr. Lamorena: We have evidence on the lots in question.

The Court: Have you got a single case, single instance of any property that was sold for \$1.00 square meter. You questioned the importance of those sales; you didn't present any evidence at all as to those sales that have been made. Now if this jury relies on your side of the case, certainly some information, as the government gets it, as to what its opinions are based on if you have the sales of the land at this particular time which is the basis of its market value. The court must ask why didn't you? I can't permit this jury to guess without having something in the way of foundation to go on.

Mr. Lamorena: Your Honor, please, the jury will accept the expert witnesses, all witnesses presented.

The Court: Mr. Calvo didn't even begin to tell that something has been paid and didn't even indicate, your own witness is a witness that testified to his purchase and the government [72] accepts that valid purchase and uses it as part of the basis of its own evaluation. Frank Perez' purchasing of the property, they give to the jury as an example of reasonable value. His testifying as an expert witness is in a different category. He was testifying to something different, and having testified, he must be able to demonstrate as Mr. Woelfl demonstrated that he is basing it upon actual sales that have been made, not upon venture.

Mr. Reyes: Mr. Calvo read many sales at their market values.

The Court: In Barrigada?

Mr. Reyes: Yes.

The Court: The jury cannot guess at that. I shall have to direct a verdict for the government based upon the government's testimony upon the grounds that there is no evidence offered before the court as to the value of the lands. The court, therefore, orders that a judgment be prepared as follows: On Tract 2, part of Lot 1074, judgment in the amount of \$1,220.00; Tract 4, Lot 1069, 72,120 square meters, judgment will be entered in the amount of \$2,860.00; Tract 5, Lot 1068, consisting of 3455 square meters, judgment will be entered in the amount of \$225.00 and Tract 15, Lot 1075, judgment be entered in the amount of \$565.00. Those are the figures testified by the government. When the jury comes in at 9:30 in the morning, I will explain to them that I find it necessary to direct a verdict in this case as I simply could not let this go to the jury with the testimony at its present stage.

Mr. Lamorena: May we have our exceptions?

The Court: Sure. In those amounts that I have entered, the order is as of now. I will be available not later than 8:30 in the morning. In the interim period you can bring in any evidence that will justify me in entering a different order. The [73] court will recess until 9:30 tomorrow morning.

(Whereupon at 3:20 p.m., a recess was taken by the court.)

April 9, 1957—9:30 a.m.—Jury reports.

The Court: The record will show that the jurors are present. Ladies and gentlemen of the jury, I am sorry that I had to call you back this morning after you were excused yesterday afternoon. Certain developments occurred in this case which I shall explain to you. The law is that when any question of fact is before the court and jury, it is the responsibility of the jury and the exclusive responsibility and belief of the jury to determine that question of fact. If, however, there are no facts before the jury, no competent evidence before the jury upon which it could make a finding of fact, it is the responsibility of the court as a matter of law to direct what the law requires. Now after you left yesterday afternoon, the government moved for judgment in this case based upon its testimony. The court has held that that motion had to be granted and that judgment as a matter of law should be entered on the basis of the testimony of the government's witnesses. Now the reason for that is this, expert witnesses are of course permitted to testify on actions of this kind. Opinions or evidence when presented to the jury must be based upon sufficient study and detail knowledge of the situation so that the jury would be at liberty to accept if it is so desires, the conclusions of those expert witnesses. Now in this particular case, the only figure that you had before you was Mr. Calvo's testimony that in his opinion this land involved was worth \$1.00 a square meter on April 11, 1949. There was no evidence of research to

justify that conclusion. In other words if the jury had accepted that testimony [74] at \$1.00 per square meter, at that time, in no circumstances would the court have upheld that verdict. That would have meant that when the military officials were confronted with necessity for finding homes, places to live for people who had been made homeless by the exigencies of war when the military had taken over this agricultural area and had built temporary homes, that is all they were, in order to provide housing for the people and then had taken the title to that land three years later; that the former owners of this agricultural land should be paid for that land upon the basis that it was a build-up residential area. It is elementary in law, ladies and gentlemen of the jury, that the government's necessity may not become the land owners opportunity. Consequently you had before you only the testimony of the government's witnesses as to the value of the appraised value of that property on April 11, 1948 and accordingly the court has directed that judgment be entered in favor of the land owners in the amounts testified to by the government's appraisers. In other words, the court is of the view that you had no evidence before you upon which you could properly have found any other judgment or any verdict other than that based upon the testimony of the government's witnesses; that being the case, it is the responsibility of the court to direct a verdict without further consideration by the jury. The jury is, therefore, discharged and you are asked to report at 9:30 next Monday

morning. I thank you very much for your attendance and the careful consideration you took during this case. The jury is discharged. The court will adjourn until further notice.

(Jury discharged at 9:45 a.m.) [75]

District Court of Guam,
Territory of Guam—ss.

I, Maria A. Atoigue, Official Court Reporter for the District Court of Guam, hereby certify that the above and foregoing is a true and correct transcript of the proceedings had in the above-entitled matter had in the said court at the time and place as set forth.

/s/ MARIA A. ATOIGUE,
Official Court Reporter. [76]

[Endorsed]: No. 15813. United States Court of Appeals for the Ninth Circuit. Manuel C. Blas, and The Estate of Jose Martinez Torres, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: November 21, 1957.

Docketed: December 11, 1957.

Reporter's Transcript Filed: March 31, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15813

380,438 Square Meters of Land, more or less, in
the Municipality of Barrigada, Island of Guam,
Marianas Islands, and the Estate of Antonio
Ingay Bayona, deceased, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT BY APPELLANTS OF POINTS
ON WHICH THEY INTEND TO RELY

Appellants, above-named, state that the points on
which they intend to rely on the appeal in this
action are as follows:

1. The trial court erred in granting Plaintiff's
Motion for Directed Verdict, instead of submitting
the case to the jury, there being substantial and
relevant facts presented for the jury to decide;

2. The trial court erred in denying Defendants-
Appellants' Motion to Set Aside Order and Judg-
ment For New Trial.

Dated 3rd December, 1957.

REYES & LAMORENA,

/s/ By ALBERTO T. LAMORENA,

Attorneys for Appellants Manuel C. Blas and the
Estate of Jose Martinez Torres, Deceased.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 9, 1957. Paul P.
O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

MANUEL C. BLAS and THE ESTATE OF
JOSE MARTINEZ TORRES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of Guam,
Territory of Guam

BRIEF FOR THE UNITED STATES, APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,813

MANUEL C. BLAS and THE ESTATE OF
JOSE MARTINEZ TORRES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of Guam,
Territory of Guam

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. Its grounds for directing a verdict are stated at R. 111-117.

JURISDICTION

This is an appeal filed on June 26, 1957 (R. 33-34), from a judgment (R. 27-30) filed on April 12, 1957, awarding just compensation for property condemned by the United States. A motion by appellants to set aside the order and judgment and for new trial (R. 31-32) was denied on May 3, 1957 (R. 33). The jurisdiction of the district court was invoked under

Sections 1237 to 1258, inclusive, as amended, of the Code of Civil Procedure of Guam, and 48 U.S.C. sec. 1424. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether, in a condemnation proceeding, the United States was required to pay an enhanced value for land, which enhancement had been created by the expenditure of large sums of money by the United States for the rehabilitation of the Island of Guam and its people following World War II.

2. Whether the district court erred in directing a verdict on the testimony of the expert witness of the United States which excluded the enhancement in the value of the land which had been created by the United States, when the only testimony presented by the landowners included such enhancement.

STATEMENT

On April 11, 1949, the United States¹ instituted proceedings to condemn the fee simple title to certain lands in the Municipality of Barrigada, Island of Guam, Marianas Islands, for use as the permanent site of the Village of Barrigada as an aid to and in the furtherance of the program for the rehabilitation of the Guamanian people and the economy of Guam

¹ The Naval Government of Guam established its own court, known as the Superior Court, in which it filed condemnation proceedings. When the District Court of Guam was established, these condemnation cases were removed to that court by the United States (R. 34, item 7, Clerk's Certificate of Transmittal).

(R. 8-14, 22-26). A number of parcels under separate ownership was included in the proceeding, but only three parcels are here involved: Parcel 2, which is a part of Lot 1074, containing 40,104 square meters, owned by Manuel C. Blas; and Parcel 4, which is a part of Lot 1069, and Parcel 15, which is a part of Lot 1075, both containing a total of 88,606 square meters, owned by the Estate of Jose Martinez Torres. A declaration of taking was filed and estimated compensation was deposited for Parcel 2 in the amount of \$600, and for Parcels 4 and 15 in the amount of \$1,555 (R. 3-8, 14-21).

A trial before a jury for the determination of just compensation commenced on April 8, 1957. It was the Government's position that the use of the subject land had been changed from agricultural to commercial and residential during its occupancy under a lease since 1946, and the change in use had been created by the project for which the lands were condemned. Hence, the land should be valued as if on the date of taking it was in the same condition as it was at the beginning of the lease (R. 64-65, 94-95).

This change in the use of the land was corroborated by two of appellants' witnesses, who expressed the opinion that it was the establishment of the village by the Government's rehabilitation program that changed the use of the property from agricultural to residential and commercial (R. 63, 81, 90-91). They also testified that before the war there was a town of Barrigada farther up, but the subject lands were not included in that town (R. 64-65, 80, 85-86). Appellants' valuation witness, Calvo, stated that after

the war the Government was confronted with the necessity of reestablishing people in the village. It laid out roads and took over lands to build housing for the people (R. 90). Based on what he considered comparable sales, he valued the property for commercial or residential use at \$500 for 5,000 square feet "or an equivalent to \$1.00 per square meter" (R. 81-82).

The Government presented two appraisers for the Department of the Navy. Both had been on Guam for many years and were thoroughly familiar with the subject lands prior to and during the war, and with the development of Barrigada Village (R. 92-95, 101-102). One stated that before the Government started developing the property its value was \$100 to \$200 a hectare, a hectare being 10,000 square meters. He also stated that at the time of taking, 1949, Barrigada was an "organized village by the military government," and there were some "stores and pool-halls" in it (R. 99).

The other appraiser, Woelfl, stated that he found nine sales made during 1948 and 1949 of property which he considered comparable. He used the average of these sales of \$230 per hectare to arrive at the value of the subject property. He gave greater value to the land having road frontage, approximately 170 feet in (R. 103-106, 109-110). As of April 11, 1949, he valued the subject property as follows: Lot 1074, four hectares, at \$1,220, or \$305 per hectare; Lot 1069 at \$2,860, or \$360 per hectare; and Lot 1075 at \$565, or \$250 per hectare ² (R. 106-107).

² Parcel 5, Lot 1068 (R. 107, 115), is not involved in this appeal.

At the close of the testimony, the Government moved for a directed verdict based upon the testimony of its witnesses on the grounds that there had been no relevant testimony by the landowners to support a verdict (R. 111). The court stated that there was nothing in any of the testimony introduced on behalf of the landowners to enable the jury to determine value. It directed a verdict and ordered that a judgment be prepared in the amounts testified to as the value of the lots by the Government's appraiser Woelfl (R. 111-115). In discharging the jury and informing it that a verdict had been directed, the court stated that there was no evidence to justify the conclusion of Calvo's testimony of value, and that a verdict based on his testimony would have to be set aside, as it would be awarding the former owners of this agricultural land a value based upon a built-up residential area which had been created by the Government (R. 116-117).

On April 12, 1957, a deficiency judgment was entered (R. 27-30). The landowners filed a motion to set aside the order and judgment and for a new trial, on the grounds that the court erred in not submitting the case to the jury, and erred in its rulings on the evidence (R. 31-32). The motion was denied (R. 33). This appeal followed (R. 33-34).

ARGUMENT

I

The District Court Correctly Ruled That The United States Should Not Pay An Enhanced Value For The Land Which It Has Itself Created

It is undisputed that the Government was in possession of this property under a leasehold from 1946 until the institution of the proceeding to condemn the fee title to the property (R. 64). And it is the testimony of appellants' witnesses that the establishment of the Village of Barrigada by the Government in its effort to rehabilitate the people of Guam and provide homes for them changed the use of the land from agricultural to residential and commercial (R. 63, 81, 90-91).³ In this rehabilitation program, the Gov-

³ In *Naval Government of Guam v. 11,825,263 Square Meters*, 102 F.Supp. 427 (1952), Judge Shriver states the economic conditions existing in Guam at that time and points out the drastic changes which resulted from the war, the Japanese occupation, and the re-occupation by the American armed forces. He states that:

* * * prior to the war the economy of Guam was primarily an agrarian economy where many people had farmed the same land as their ancestors had done before them for generations. Land was available for purchase at small cost in terms of present prices. There were few modern roads and few automobiles. When Guam was retaken by our forces the process of major development began. Land was occupied as needed for military purposes. Roads were constructed and improvements made without reference to existing property lines. Most buildings had been destroyed and most of the people were left without homes. In short Guam suffered a very high degree of destruction and displacement of the indigenous population.

After the Naval Government of Guam was re-estab-

ernment made large expenditures of money. In 1946, Congress appropriated \$6,000,000 to be used "toward reconstruction of the civilian economy of Guam." 60 Stat. 17, 753. In the same year it appropriated \$1,630,000 for the acquisition of property in Guam to carry out its program, 60 Stat. 803, and in 1948, \$1,600,000 was appropriated for the same purpose, 62 Stat. 225. It is thus obvious that whatever enhancement in value has resulted to the subject land has been through the efforts and at the expense of the Government.

The rule is well established that the Government is not required to pay for an enhancement in value that it has itself created. In refusing a claim for the enhancement in the market value of a tug boat which the Government had requisitioned, which enhancement was found to have been brought about (1) by the great increase in shipping and harbor traffic because of the war, and (2) by the Government's need for vessels in the prosecution of the war, in *United States v. Cors*, 337 U.S. 325 (1949), the Court stated (p. 333):

It is not fair that the government be required to pay the enhanced price which its demand alone

lished the long process began of attempting to straighten out land titles and pay compensation for occupancy. The needs of the armed services increased due to the post war importance of Guam as a defense base. Large construction projects were begun. Thousands of workers were brought in and the resulting impact of these combined expenditures was to change the economy of Guam from primarily an agrarian economy to a business and service economy.

has created. That enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what "a willing buyer would pay in cash to a willing seller," *United States v. Miller, supra*, 374 [317 U.S. 369], in a fair market. It represents what can be exacted from the government whose demands in the emergency have created a seller's market. In this situation, as in the case of land included in a proposed project of the government, the enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value, not a fair market value. That is a value which the government itself created and hence in fairness should not be required to pay.

The subject lands obviously were "within the scope of the project from the time the Government was committed to it." Hence, the rule stated in *United States v. Miller*, 317 U.S. 369, 377, that "the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned," is clearly applicable. Hence, the trial court was correct in holding that the date of valuation was April 11, 1949, the date of taking (R. 112), *United States v. Dow*, 357 U.S. 17 (1958), but that the former owners of this agricultural land should not be paid for the land upon the basis that it was a built-up residential area (R. 117).

To compensate the landowners for the enhancement in land value because of its change in use from agricultural to commercial and residential when that change has been brought about by large expenditures of money by the Government would be an unjust en-

richment of the landowners at public expense, which is plainly not required by the Fifth Amendment to the Constitution, nor any other authority claimed by appellants (Br. 5-6). A landowner whose property is condemned "is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public." *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

Appellants apparently ~~concede~~ ^{CONTEND} that the exclusion of enhancement represents an attempt to date valuation back to 1946 (cf. Br. 11). In *Miller v. United States*, 125 F.2d 75, 80 (1942), this Court thought that the rule there urged by the United States was similarly an attempt to change the date of valuation. The enhancement rule does no such thing, as the Supreme Court in the *Miller* case, 317 U.S. 369, makes perfectly plain. Valuation is determined at the date of taking, but the one particular element, enhancement caused by the activities of the United States, is excluded in determining that value. That is the instant case. And we submit there is nothing in the requirement that "just compensation" be paid that authorizes the conferring of such a windfall.⁴

⁴ The same fundamental policy is represented by the exclusion from value of improvements which the condemnor, when it condemns land, may have added to land while in possession under a lease or otherwise. *Old Dominion Co. v. United States*, 269 U.S. 55, 65 (1925); *Consolidated Turnpike Co. v. Norfolk &c. Ry. Co.*, 228 U.S. 596, 602 (1913); *Searl v. School District, Lake County*, 133 U.S. 553 (1890); *Anderson-Tulley Co. v. United States*, 189 F.2d 192, 196 (C.A. 5, 1951), cert. den. 342 U.S. 826; *Bibb County Georgia v. United States*, 249 F.2d 228 (C.A. 5, 1957).

II

**The District Court Did Not Err In Directing A Verdict
On The Government's Testimony**

The rule is well established that "when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). Appellants' argument that the district court was in error in directing a verdict on the Government's testimony as to the market value of the subject lands (Br. 6-13) is totally without merit, and ignores the legal principles discussed *supra*, pp. 7-9. The Government's testimony as to the value of the property was the only evidence presented on which a verdict legally could be based. Contrary to appellants' assertion (Br. 11), the Government's valuations were not based on 1946 values of farm lands. They were based on sales of agricultural land in the vicinity in 1948 and 1949, at or about the time of taking (R. 104-105), which were a proper basis for valuing the lands, since they were used solely for agriculture at the time the Government undertook its rehabilitation program. To have based the valuation on the land for its use as commercial and residential property at the time of taking would have included in that

value the enhancement which the Government had brought about.

Appellants' valuation admittedly included that enhancement (R. 82), and since they produced no testimony which excluded it, the court was correct in directing the verdict, and would have been obliged to set aside a jury verdict based on appellants' valuation. *Coppinger v. Republic Natural Gas Co.*, 171 F.2d 4, 5 (C.A. 10, 1948); *MacKay v. Costigan*, 179 F.2d 125, 127 (C.A. 7, 1950); *Citizens National Bank of Lubbock v. Speer*, 220 F.2d 889, 891 (C.A. 5, 1955). In affirming a judgment on a directed verdict in *Galloway v. United States*, 130 F.2d 467 (1942), affirmed 319 U.S. 372, this Court stated (p. 470): "There must be some substantial evidence offered" by the party against whom the motion for a directed verdict is made "to justify submission of the case to the jury." The term "substantial evidence" implies "competent evidence." *United States v. St. Louis Clay Products Co.*, 65 F.Supp. 645, 650 (E.D. Mo., 1946). The *Galloway* case and others relied upon by appellants (Br. 7-8) support the principles for which they are cited, but since no substantial or competent evidence was offered by appellants, there was no question of the trial court's weighing the evidence.

Nor was there any conflict in the testimony of the various witnesses as to use of the property, as contended by appellants (Br. 9-11). Their argument that there was direct testimony for them that the property was "residential and commercial (R. 61, 63, 80-81), and direct testimony to the contrary by ap-

pellee's witnesses" (R. 94, 107) is not supported by the record. The testimony of appellants' witnesses referred to is in regard to the classification of the property in 1949. The reference to the testimony of the Government's witness, Judge Bitanga (R. 94), was the use which was made of the property "after the war and before the establishment of the Village of Barrigada." His testimony is clear that at that time the property was used for agricultural purposes, and in 1949 it was already an "organized village by the military government," and there were "just some stores that they put up, stores and poolhalls" (R. 99). Nowhere in his testimony did he state that the property was being used for agriculture in 1949. And the Government's appraiser, Mr. Woelfl, stated that on April 11, 1949, the subject lots were "part of the Village of Barrigada" (R. 107). Later, in his cross-examination (R. 109), counsel began a question: "Mr. Woelfl, you said that Lots 1074, 1075 and 1069 were commercial and residential on April 11, 1949." Hence, appellants' argument (Br. 9-10) is inconsistent with the testimony brought out by their own counsel from the Government's witness, and should be ignored.

It is obvious that there was no competent evidence as to value except that presented by the Government, and no conflicting evidence as to the use of the property. Hence, there was nothing which should have been submitted to the jury. In passing upon the Government's motion, the court stated (R. 111-112):

Your motion will be overruled or denied as to the question of Mr. Calvo's qualifying to testify

but on the second part of the motion, there was nothing in any of the testimony introduced on behalf of the defendants to enable this jury to determine values. Mr. Calvo did not break down these values according to lot, according to locations, according to being on the highway or not being on the highway. The only testimony that Mr. Calvo gave was that the property was worth \$1.00 per meter.

And in appellants' argument on the motion, the court stated (R. 114):

Have you got a single case, single instance of any property that was sold for \$1.00 per square meter? You questioned the importance of those sales. You didn't present any evidence at all as to those sales that have been made. Now if this jury relies on your side of the case, certainly some information, as the government gets it, as to what its opinions are based on if you have the sales of the land at this particular time which is the basis of its market value. The court must ask why didn't you? I can't permit this jury to guess without having something in the way of foundation to go on.

After directing a verdict based on the Government's valuations of the three parcels, the court gave counsel for appellants an opportunity to bring in any evidence the following morning which would justify its entering a different order. They did not take advantage of this opportunity, and are now asking this Court to re-weigh the evidence and give them another chance. In dealing with motions for directed verdicts, the appellate courts "do not consider contradictory evidence or the weight of the evidence, or the

credibility of the witnesses." *Marquette Cement Mfg. Co. v. Campbell Const., Co.*, 184 F.2d 352 (C.A. 6, 1950).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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OCTOBER 1958

No. 15,813

United States Court of Appeals
For the Ninth Circuit

MANUEL C. BLAS, and THE ESTATE OF
JOSE MARTINEZ TORRES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of Guam.

BRIEF OF APPELLANTS.

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FILED

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No. 15,813

**United States Court of Appeals
For the Ninth Circuit**

MANUEL C. BLAS, and THE ESTATE OF
JOSE MARTINEZ TORRES,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of Guam.

BRIEF OF APPELLANTS.

OPINIONS BELOW.

The opinion of the District Court in Cause Number 15,813 is found in the Transcript of the Record at pages 116 and 117.

JURISDICTION.

Jurisdiction is based on U.S.C., Title 48, Sec. 1424. Appeal to the court is taken pursuant to U.S.C., Title 28, Sec. 1291.

STATEMENT OF FACTS.

This is an action in condemnation brought by the United States of America for the acquisition of 368,-

561 square meters of land in the Municipality of Barrigada, three (3) tracts of which are the subject matter on appeal, namely:

1. Tract 2, part of Lot 1074, consisting of 40,104 square meters, formerly owned by appellant, Manuel C. Blas.

2. Tract 4, part of Lot 1069, consisting of 74,126 square meters and Tract 15, Lot 1075, consisting of 16,480 square meters, formerly owned by the heirs of Jose Martinez Torres, deceased.

These three tracts are adjacent to one another and have the same productivity, accessibility, uses and values. Prior to World War II the Municipality of Barrigada was principally a farming region, but there were about 800 permanent residents in the Municipality. A portion of Tract 2, part of Lot 1074, designated as Lot 1074-3, was occupied by the Police Headquarters of the Municipality of Barrigada before the war.

In the Municipality of Barrigada before the war, there were two fairly large schoolhouses, a Catholic Church, two stores, two coral highways and residences that spread all over the area, but most of these were destroyed in the course of construction of Post War Navy installations.

Sometime in 1945, the Naval Government of Guam sub-divided the present Barrigada Village and built some houses to rehabilitate the needy. The more fortunate ones built their own houses, and stores. The church in the area within the perimeter of the three

tracts was built by the parishioners. Then on April 11, 1949, a Declaration of Taking was filed concerning 380,438 square meters of land, more or less, in the Municipality of Barrigada, but the area was later reduced to 368,561 square meters as per amended Declaration of Taking dated May 1, 1952. On the date of Taking these tracts were already a residential and a commercial area.

Out of these 368,561 square meters, 128,710 square meters formerly belonged to the appellant herein.

The Declaration of Taking was originally filed with the then Superior Court of Guam, but was later transferred to the District Court of Guam. The case was tried by a jury on April 8, 1957, and on the same day the District Court of Guam issued an order granting a motion of appellee for directed verdict. On April 12, a Deficiency Judgment was filed on Guam. On April 22, 1957, the District Court denied appellants' motion to set aside Order and Judgment for New Trial. Hence this appeal.

QUESTIONS PRESENTED.

Was enough evidence produced relating to the value of the land to allow the question to be presented to the jury for decision?

Did the court direct a verdict which prescribed values based on agricultural land when, in fact, the property was residential and commercial?

Should the property have been valued as of April 11, 1949 the date of the Declaration of Taking, or some earlier date?

SPECIFICATION OF ERRORS.

1. The trial court erred in not submitting the case to the jury, there being substantial and relevant facts presented for the jury to decide.

2. The trial court erred in considering merely the sales of agricultural lands to support the order and judgment, the lots in question being admitted by the parties to be residential and commercial at the time of the taking.

3. The trial court erred in not evaluating the testimony of the expert witnesses presented by the appellants and the testimony of the other appellants' witnesses concerning the value of lands which are close to the lots in question.

4. The trial court erred in that the order and judgment are against the weight of or contrary to the evidence.

5. The trial court erred in that the amount awarded in this judgment is not the fair value or just compensation of the lots in question on the date of vesting, that is April 11, 1949.

6. That the trial court erred in directing the verdict in that the credibility of the witnesses and the weight of their testimony are for the jury and not for the court to determine.

SUMMARY.

The value of property in a condemnation suit is a question of fact for the jury to decide, and it should not be taken from the jury if there is conflicting evidence presented. If a motion for a directed verdict is made, the evidence must not be weighed by the court, and must be considered in the light most favorable to the party against whom the motion is made.

Substantial and relevant evidence pertaining to the value of the property and the classification of the property were submitted by the appellant and therefore the matter should have been submitted to the jury.

The property should have been evaluated as of the date of the Declaration of Taking, or April 1949, a time when both the appellants and appellee conceded that it was classed as residential and commercial property.

ARGUMENT.

I.

THE VALUE OF PROPERTY SUBJECT TO A CONDEMNATION SUIT IS A MATTER OF FACT WHICH SHOULD BE SUBMITTED TO THE JURY WHEN SUBSTANTIAL AND RELEVANT EVIDENCE OF VALUE HAS BEEN PRODUCED.

- A.** The right to receive just compensation for property taken for public use is a right guaranteed by our most sacred legal tradition, and all procedural safeguards of that right should be zealously followed.

The case at hand arose through the exercise of the power of eminent domain by a governmental agency. Both the due process clauses of the federal constitu-

tion, *United States Constitution, Amends. 5, 14*, and the "Bill of Rights" of the *Organic Act of Guam*, August 1, 1950, c. 512, Sec. 5e, 5f, 48 U.S.C. Section 14,216 provides that private property cannot be taken for a public use without due process of law and without the payment of just compensation.

The right of eminent domain, which predates the very existence of our country, was and is considered to be superior to all rights of private property. The provisions guaranteeing just compensation and due process of law such as are found in United States Constitution and in the Organic Act of Guam *supra* are not grants of power but are limitations on the exercise of the use of eminent domain. *United States v. A Certain Tract or Parcel of Land in Chatham Co., Ga.*, 44 F. Supp. 712 (S.D. Ga. 1942). Thus, the founders of our country, in effect, started a tradition of zealous protection, both procedurally and financially, of the rights of private ownership. This tradition was followed in the drafting of the Organic Act of Guam.

- B. The value or just compensation of the property subject to condemnation is a question of fact for the jury to determine.**

In condemnation proceedings in the federal courts, the general rule prevails that while questions of law are reserved for the court, if there is conflicting evidence, questions of fact relating to valuation and assessment of damages should be submitted to the jury. *Karlson v. United States*, 82 F. 2d 330 (8th Cir. 1946). The same general rule applies in determining

the highest and best use for the property. *Atlantic Coast Line Ry. Co. v. United States*, 132 F. 2d 959 (5th Cir. 1943). It is also true that the general rule that it is for the jury to determine the credibility and the weight to be accorded the evidence presented applies in condemnation proceedings. *United States v. Meyer*, 113 F. 2d 387 (7th Cir. 1940).

- C. If conflicting evidence is presented relating to a question of fact, it is for the jury to determine the issue after it has weighed the evidence, and it is error for the court to direct a verdict in the face of conflicting evidence.

The rule is well settled that in civil cases tried by a jury, questions of fact are for the jury to decide, and not for the court. *First National Bank v. United States*, 102 F. 2d 907 (7th Cir. 1939), cert. denied 59 Sup. Ct. 1038, 307 U. S. 641, 83 L. Ed. 1521. Therefore, if there has been evidence submitted by both parties, it is for the jury to determine the facts established, and it is error to direct a verdict, even though there may seem to be a decided preponderance of the evidence for the moving party. *United States Fidelity and Guaranty Co. v. Blake*, 285 Fed. 449 (1923), cert. denied, 262 U. S. 748, 43 Sup. Ct. 523, 67 L. Ed. 1213 (1922).

In entertaining a motion for a directed verdict, the court must not weigh the evidence. The weight as well as the credibility of witnesses are matters for the jury, *Galloway v. United States*, 130 F. 2d 467 (9th Cir. 1942); *Johnson v. Dierks Lumber and Coal Co.*, 130 F. 2d 115 (8th Cir. 1942), and where a case fairly depends upon the weight or effect of the testi-

mony, it is a matter for the consideration of that body, under proper instructions as to the principles of law involved. *Delk v. St. Louis and S. F. Ry. Co.*, 220 U.S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617 (1911); *Mutual Benefit Health and Accident Association v. Snyder*, 109 F. 2d 469 (6th Cir. 1940), and it is error to direct a verdict under such circumstances. *Lowrie v. American Surety Co. of New York*, 146 F. 2d 33 (5th Cir. 1944). When considering such a motion, the evidence as presented must be considered in its aspect most favorable to the party against whom the motion is made, with every fair and reasonable inference which the evidence justifies being considered. *Mandio v. Vibbert*, 170 F. 2d 540 (4th Cir. 1948) citing *Gunning v. Cooley*, 281 U. S. 90, 94; 50 Sup. Ct. 231, 74 L. Ed. 720 (1929).

- D. Substantial and relevant evidence was presented by the appellants relating to the property values involved in this case, therefore, the amount of compensation awarded should have been left to the jury to determine.**

Examination of the record shows that at least two important issues relating to the question of just compensation were the subject of conflicting evidence. These are (1) the actual market value of the property and (2) the classification of the property as residential and commercial rather than agricultural. There is a third important issue, bearing on the valuation that does not appear from the record to have been resolved. That is the date on which the valuation should have been made. These three issues will be discussed in order, separately.

(1) Actual market value.

The appellee presented two witnesses, Jose L. G. Bitanga (R. 92) and William A. Woelfl (R. 101), both of whom seem to have qualified to give opinion testimony relative to property values. While Mr. Bitanga's testimony was very general, Mr. Woelfl's was very specific. He states (R. 106, 107) his opinion of the exact value of each parcel involved, values subsequently adopted by the court.

In direct conflict to this testimony was the evidence offered by the appellant. The appellant offered three witnesses, the Honorable Jose C. Manibusan (R. 57), Frank D. Perez (R. 69), and Eduardo Calvo (R. 76). The first two of these witnesses testified in general terms, relating more to the classification of the property, but Mr. Perez, who was qualified to give opinion testimony (R. 82, 83) testified specifically as to the fair value of the property, to-wit \$1.00 per square meter (R. 82). In so doing he stated the factors he takes into consideration in making an appraisal (R. 79) and the particular factors used in making this particular appraisal (R. 82). If there was nothing else in the Record, the testimony of Mr. Calvo and Mr. Woelfl make a direct conflict on the primary issue of the case, just compensation for property taken for public use.

(2) Property classification.

There is, in the Record, a good deal of testimony for both parties as to the classification of the land involved. There is direct testimony for the appellants

that the property was residential and commercial (R. 61, 63, 80, 81), and direct testimony to the contrary by appellee's witnesses (R. 94). Mr. Woelfl stated, on cross-examination that the parcels involved were "part of the Village of Barrigada" in 1949 (R. 107). These classifications were urged, of course, because of the effect each would have on determining market value.

The court, which in directing the verdict adopted Mr. Woelfl's opinion (R. 106, 107) as to the property value (R. 115), stated on page 112 of the Record:

It should not be given as agricultural land. The government concedes that the testimony of the value is based upon the value of the lots on April 11, 1949 as residential, so the government is not insisting that these lots be valued for agricultural purposes. Mr. Woelfl's testimony is that they are residential and business.

The appellants submit that no such concession was made by the government, and that the court therefore accepted the government's valuation on an erroneous premise assuming that one of the vital issues, classification of the property, was not in issue when it in fact still was.

Appellee stated (R. 64) "these lands were all leasehold condemnations from 1946 until the fee was taken. The basis of evaluation is of farm land". Then, again (R. 64) states "the land is considered as if on the date of taking it was in the same condition as it was at the time of the lease". The only concession made was that at the time the fee was taken the property was residential and commercial (R. 65). This is not a

concession that the property values offered by appellee were based on 1949 residential and commercial values as was indicated in the above quotation by the court, and on which the court based its directed verdict.

Therefore, although Mr. Woelfl's appraisal valuation, accepted by the court, is stated to be as of the date of taking, April, 1949, it considered the land to be in the same condition as when the lease was made, that is, farm land.

(3) Time of valuation.

Throughout the record, a rapid post-war change in the classification of the property is indicated. This makes the date of valuation of the property a very important issue and one which does not seem to be resolved. The appellant, as is evident from the appraisal made by its witness (R. 82, 83) considers the date of valuation to be 1949, the date of the actual taking. Appellee insists that the date of appraisal is 1946 (R. 64) basing this on the existence of a leasehold condemnation. There is nothing in the Declaration of Taking (R. 31), the Amended Declaration of Taking (R. 14), the complaint (R. 8) or the Amended Complaint (R. 22) to indicate that the date of valuation should be any date other than the date of taking. Nor is there any evidence in the record other than the statement of the attorney for appellee (R. 64) referred to above, to indicate that there should be any other date of valuation.

Yet the court adopted the appellee's appraisal, based on 1946 values, as its own. When doing so it appeared to believe that the appraisal was based on

1949 valuation (R. 112), but on the following day the court, in instructing the jury of its decision stated, (R. 117) in discounting the appellants 1949 appraisal:

. . . the military had taken over this agricultural area and had built temporary homes . . . in order to provide housing for the people and then had taken the title to that land three years later; (appellants' appraisal would mean) that the former owners of this agricultural land should be paid upon the basis that it was a built-up residential area.

Thus it appears that if the court was originally mistaken as to the date of valuation of appellee's appraisal, it later corrected its impression and continued to accept the same dollar values as being just compensation, even though they were based on a period three years prior to the actual taking. This was done, even though there was no evidence or other indication of the existence of a lease. Nor is there any other basis for pre-dating the valuation, and, in fact, the court made no ruling as to the basis for this action.

II.

THE ORDER DIRECTING THE VERDICT SHOULD HAVE BEEN SET ASIDE AND A NEW TRIAL GRANTED UPON APPELLANTS' TIMELY MOTION.

The same arguments stressed in I of this brief, urging that the court below erred in directing the verdict, apply here. That is, that there was sufficient

evidence to take the questions of valuation to the jury, and that the court adopted valuation figures based on an incorrect date and incorrect classification of the property as agricultural.

CONCLUSION.

Appellant respectfully submits that the trial court erred in directing the verdict and in denying the motion for a new trial, and therefore its decisions should be reversed and the case remanded for a new trial.

Dated, September 3, 1958.

Respectfully submitted,

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No. 15814

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942,
AFL-CIO, RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

NOV 10 1958

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15814

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942,
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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

In its brief the Union does not contest the Board's findings that the two-fold object of its picketing and other conduct was to obtain from Alloy recognition as the exclusive bargaining agent of its employees, and a contract compelling membership in the Union as a condition of employment. Nor does the Union contest the further finding that it did not represent a majority of Alloy's employees during the events in this case, so that accession to these objectives by Alloy would have resulted in unfair labor practices on its part. The Union nevertheless contends that it committed no unfair labor practices, except insofar as it sought, by its picketing, to obtain a union shop—which conduct the Union concedes (br. 53) the Board

properly found to be violative of Section 8 (b) (2) of the Act.

It is the Union's position, first, that picketing to compel immediate recognition on behalf of a union which does not represent a majority of the employees does not restrain or coerce employees within the meaning of Section 8 (b) (1) (A)—a position which it acknowledges (br. 42, n. 50) is contrary to the reasoning of this Court's decision in *Capital Service, Inc. v. N. L. R. B.*, 204 F. 2d 848. Second, the Union contends that the use of a "We Do Not Patronize" list is in any event distinguishable from picketing, so that, insofar as it sought to further its objectives by the former means, not even the finding of an 8 (b) (2) violation is warranted. Finally, the union contests the breadth of the Board's order.

In this reply brief, we shall address ourselves to those of the Union's arguments, on each of these phases of the case, which were not fully anticipated in our opening brief.

I. The contention that the Union's picketing did not violate Section 8 (b) (1) (A) of the Act

A. The Union's conclusion that recognition of picketing by a minority union is not violative of Section 8 (b) (1) (A) rests principally on the argument that "By Section 8 (b) (4) (C) Congress has expressed the sole extent to which it intends to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it * * *" (br. 9). The history of Sections 8 (b) (4) (C) and 8 (b) (1) (A), however, reveals just the opposite.

Thus, Section 8 (b) (4) (C) was contained in the Senate bill as it was reported out of committee, while Section 8 (b) (1) (A) was not. S. 1126, 80th Cong., 1st Sess., p. 15, I Leg. Hist. 113. Accordingly, the most that may be inferred from Section 8 (b) (4) (C), when it appeared as part of the Senate bill, is that it went as far as a majority of the *Senate Labor Committee* thought Congress should go in regulating union efforts to compel recognition. But five members of the Committee—including Senators Taft and Ball—were dissatisfied with the reported bill because they believed it was not stringent enough in its regulation of some union activities. They filed a statement of Supplemental Views in which they advised that they would seek amendments on the floor, including one similar to the present Section 8 (b) (1) (A). S. Rep. 105, 80th Cong., 1st Sess., p. 50–56, I Leg. Hist. 456–462. And they indicated that their purpose in seeking the latter amendment (see Bd. br. 22–23) was to outlaw conduct on the part of unions, which, if engaged in by an employer, would be violative of Section 8 (a) (1).

Moreover, in the debates on Section 8 (b) (1) (A), the sponsors of the provision made clear that one of the situations intended to be covered thereby was where a union resorted to economic pressure for the purpose of foisting itself upon employees who did not want to be represented by it (see Bd. br. 25–26). Indeed, since an employer violates Section 8 (a) (1) if he grants exclusive recognition to a minority union (Bd. br. 23), encompassing union pressure to obtain this illegal object was essential to give 8 (b) (1) (A) the equivalence in scope sought by its sponsors.

In these circumstances, the adoption of Section 8 (b) (1) (A) on the Senate floor, as an amendment to the Committee bill, can only be viewed as an enlargement upon the provisions of the bill as reported by the Senate Committee—including Section 8 (b) (4) (C).¹ And, since the Senate bill as thus amended was the bill ultimately adopted by both Houses, this conclusion respecting the relation between Sections 8 (b) (1) (A) and 8 (b) (4) (C) carries over to the law as enacted. The fact that Section 8 (b) (1) (A) was intended to augment the provisions of Section 8 (b) (4) (C), insofar as union efforts to compel recogni-

¹ Contrary to the Union's contention (br. 36-40), Section 8 (b) (4) (C) does not become redundant if Section 8 (b) (1) (A) were construed to cover union efforts to compel recognition. As we have shown (Bd. br. 31-34), the two provisions have different roles to play. In Section 8 (b) (4) (C) Congress sought to protect the integrity of an outstanding Board certification against economic attacks by a rival union. That is, until revoked under the peaceful procedures of the Act (e. g., a decertification proceeding under Section 9 (c)), the certification was entitled to presumptive validity, even though the rival union may have, in the meantime, succeeded in winning a majority of the employees away from the certified union. In short, Section 8 (b) (4) (C) would bar picketing for recognition even by a majority union—a not infrequent situation where the outstanding certification is of several years duration. On the other hand, Section 8 (b) (1) (A) applies where there is no outstanding certification and the union seeking recognition does not represent a majority of the employees.

Nor is there substance to the Union's further contention (br. 37) that "the view that Section 8 (b) (4) (C) prohibits majority strikes or picketing for recognition in the face of an unrescinded certification of a minority union commands the assent of only two of the five members of the Board." In the *Paint Makers (Andrew Brown)* case, cited by the Union (br. 37, n. 46), four members of the Board specifically adopted this view.

tion were concerned, is confirmed, furthermore, by the House conferees. They acceded to Section 8 (b) (1) (A) of the Senate Bill upon the assumption that the provisions of Section 12 (a) of the House bill, which outlawed in specific terms, *inter alia*, minority picketing for recognition, were unnecessary because "many of the matters covered [therein] * * * are also covered in [Section 8 (b) (1) (A) of the Senate bill]" H. Conf. Rep. 510, 80th Cong., 1st Sess., pp. 59, 42, I Leg. Hist. 563, 546. (See also, Bd. br. 30-31.)²

B. Nor is the Union's contention that Section 8 (b) (4) (C) goes as far as Congress desired, in proscribing union efforts to compel recognition, advanced by the fact that numerous proposals have been made since the passage of the 1947 amendments to outlaw minority picketing for recognition in circumstances not covered by 8 (b) (4) (C), but that these efforts have not succeeded (br. 15-18). It is commonplace that at-

² The foregoing analysis is not altered by the Union's reliance (br. 10) on the passage in the Conference Report which, repeating language taken from the Senate Report, states that "the primary strike for recognition (without a Board certification) was not prohibited" H. Conf. Rep. 510, 80th Cong., 1st Sess., 43, I Leg. Hist. 547; S. Rep. 105, 80th Cong., 1st Sess. 22, I Leg. Hist. 428. This statement was made in describing Section 8 (b) (4) (B), which prohibits a union, even though it may represent a majority of the employees, from inducing secondary strikes to put pressure on the primary employer to grant the recognition the union is entitled to. In this context, it was necessary to make clear that such a majority union remained free to compel recognition by striking the primary employer himself, and accordingly the reassuring statement quoted above was made.

tempts are frequently made in Congress to clarify legislation, even though such clarification may not actually change existing administrative or judicial interpretations. Accordingly, the mere fact that amendments to existing legislation have been proposed does not necessarily indicate that the power sought to be articulated does not now exist. See *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47.

For example, several unsuccessful attempts were made subsequent to 1947 specifically to ban secondary boycotts implemented through "hot cargo" clauses—both before and after the Board had reached the conclusion that such clauses did not constitute a defense to a Section 8 (b) (4) violation. See, e. g., 100 Cong. Rec. 6121, 6125–6 (1954), 102 Cong. Rec. 8021–8022 (1956). Indeed, the recent effort in the 85th Congress to amend the Act contained not only proposals relating to minority picketing for recognition, as the Union points out (br. 15–17), but also proposals which would expressly have removed "hot cargo" clauses as a defense to secondary boycott violations under the Act. See S. 3099, 85th Cong., 2nd Sess., Sec. 3, introduced on January 23, 1958, immediately following the President's message recommending such action (reported in 41 L. R. R. M. 78, 81). These proposals respecting "hot cargo" clauses, however, did not preclude the Supreme Court from concluding that Congress had already achieved their effect by the general language contained in Section 8 (b) (4). See *Local 1976 v. N. L. R. B.*, 357 U. S. 93. Similarly, neither should the recent proposals dealing with recognition picketing have any decisive bearing

on whether that subject is already covered by the general language of Section 8 (b) (1) (A).

C. The Union stands on no better footing in attempting to explain away the instances in the legislative debates wherein Senators Taft and Ball illustrated the meaning of Section 8 (b) (1) (A) by allusions to peaceful picketing like that involved in this case, on the ground that they later backtracked (br. 26). No disavowal of these important illustrations (see Bd. br. 25-26) ever occurred. On the contrary, when Senators Taft and Ball agreed to the deletion of the phrase "interfere with" from Section 8 (b) (1) (A), which the Union asserts reflects a "change in mood" as to the Senate's understanding of the Section's coverage (br. 26), they did so only because they did not consider that any change in meaning was thereby effected (see Bd.'s br. 29, n. 13). In sum, the examples enumerated in the legislative debates which show that the coercion proscribed by Section 8 (b) (1) (A) could result from peaceful picketing are no less important in determining the scope of that Section than are those which describe coercion by physical force.

It is also significant that the Union does not contest, as indeed it cannot, our showing (opening br. 22-24) that the central purpose of Section 8 (b) (1) (A), as revealed by its legislative history, was to impose on unions sanctions equivalent to those already imposed on employers by Section 8 (a) (1). To be sure, the Union suggests that the differences between unions and employers prevent a mechanical application of the two provisions to like situations (br. 26-27). But, al-

though this may be so in some instances (see the discussion in n. 36, p. 27, of the Union's brief), it is manifestly not so in all instances.³ And there can be no doubt that Congress intended an even-handed application of Sections 8 (a) (1) and 8 (b) (1) (A) insofar as possible. See *Capital Service v. N. L. R. B.*, 204 F. 2d 848, 852 (C. A. 9). The case of minority picketing for recognition presents a most appropriate and practicable occasion to give effect to this intended principle of equivalence. For, as shown in our opening brief (p. 23) and noted *supra* (p. 3), an employer violates Section 8 (a) (1) if he accords exclusive recognition to a minority union, and there is no valid reason why a union should be under any lesser obligation to respect the right of employees freely to select their own representative.

D. The Union relies on *Electrical Workers v. N. L. R. B.*, 341 U. S. 694, to support its argument that Section 8 (c), which protects *noncoercive* speech (Bd. br., 37-41), immunizes its picketing in this case. In that case, as we have shown (*ibid.*, pp. 39-40), the Supreme Court limited the protection of Section 8 (c)

³ The Union's argument is reminiscent of one made by Senator Morse during the legislative debate on Section 8 (b) (1) (A). He contended that Section 8 (b) (1) (A) was unnecessary because: (1) insofar as it was intended to cover physical coercion, this matter was already subject to regulation by the local authorities; and (2) insofar as it was intended to cover economic coercion by unions, the Act's ban on closed shops adequately covered that problem and, in any event, economic threats by a union were not as "dangerous" as those by an employer because the union was not in the same position to carry out the threat. See II Leg. Hist. 1192-1193, 1195-1197. The Senate rejected these arguments in enacting Section 8 (b) (1) (A).

to “noncoercive speech * * * in furtherance of a *lawful* object.” [Emphasis supplied.] 341 U. S. at 704. This limitation places Section 8 (c) to one side in the instant case, for the Union’s object was concededly unlawful.

But the Union asserts that the unlawfulness of the object was not the reason why the Supreme Court declined to apply Section 8 (c) in *Electrical Workers*, which involved peaceful picketing designed to induce a secondary boycott. Rather, the Union seeks to explain the holding in that case on the ground that the Act’s secondary boycott provisions, unlike Section 8 (b) (1) (A), were meant to reach peaceful picketing; accordingly, unless Section 8 (c) were found to be inapplicable to the secondary boycott provisions, they would be redundant, having a scope no greater than that of Section 8 (b) (1) (A), which admittedly applied to nonpeaceful picketing (Un. br. pp. 30–31).

Apart from the clear statements in the Supreme Court’s opinion which show that the illegality of the Union’s objective was a decisive consideration in finding Section 8 (c) inapplicable, the short answer to this argument is that nothing in the *Electrical Workers*’ opinion warrants the Union’s initial premise that the Court viewed Section 8 (b) (1) (A) as limited to nonpeaceful conduct. The fact that this Section covers nonpeaceful picketing, as the Supreme Court pointed out, may well show that other provisions of the Act meant to go beyond that coverage (see, for example, the discussion *supra*, pp. 3–5, of the interrelation between Sections 8 (b) (1) (A) and 8 (b)

(4) (C)). It does not follow, however, that the Court was thereby concluding—for indeed it had no occasion to consider such question—that nonpeaceful conduct was all that Section 8 (b) (1) (A) covered. Moreover, as this Court has recognized in *Capital Service*, peaceful picketing may impose economic coercion, and when it does, as here, Section 8 (b) (1) (A) does in fact encompass it.

E. Equating picketing with striking, the Union further argues that the protection given in Section 13 of the Act to strike conduct, “except as specifically provided for [elsewhere in the Act],” operates to save the picketing in this case from Board regulation (br. pp. 32–33). But if the Board is correct in its conclusion that the Union’s picketing constituted restraint and coercion within the meaning of Section 8 (b) (1) (A), then Section 13 has no application. For Section 8 (b) (1) (A) “is a specific provision and if it is violated Section 13 is of no help.” *Truck Drivers Union, Local 728 v. N. L. R. B.*, 249 F. 2d 512, 515 (C. A. D. C.), certiorari denied, 355 U. S. 958. And it is of no consequence in this connection that Section 8 (b) (1) (A) is not expressly directed against strikes. Neither is Section 8 (b) (2), but the Union concedes (br. 53) that its picketing violated that provision, regardless of Section 13. The Union also readily admits (br. 19–28) that Section 8 (b) (1) (A) condemns violent picketing, again notwithstanding Section 13’s immunizing language. The short of the matter is that the question in this case does not turn on Section 13; if the Union’s picketing is coercive within the meaning of Section 8 (b) (1) (A), Section

13 can be "of no help." *Truck Drivers Union, Local 728, supra.*

II. The contention that use of the "We Do Not Patronize" list is not violative of the Act

The Union argues that, even if Section 8 (b) (1) (A) may be deemed to reach its peaceful picketing, that provision cannot reach its circulation of the "We Do Not Patronize" list, for such conduct, unlike picketing, is in no sense coercive (Un. br., 42-52). Indeed, the Union contends (br. 55) that the use of such list may not even be found to constitute a violation of Section 8 (b) (2). There is no merit to these contentions.

A. The distinction which the Union would draw between its peaceful picketing and its use of the "We Do Not Patronize" list overlooks that it is the impact of the Union's activity on Alloy and its employees which is relevant for purposes of Section 8 (b) (1) (A). That is, granted that an unfair list is less coercive than picketing insofar as inducing third parties to cease doing business with Alloy is concerned, the fact remains that both techniques are designed to achieve the same result—i. e., a curtailment of Alloy's business—and it is that which has the coercive or restraining effect on Alloy's employees that Section 8 (b) (1) (A) proscribes. Accordingly, we submit that the Board properly concluded (see Bd. opening br. 21-22, 38-39) that no distinction may be drawn, for purposes of Section 8 (b) (1) (A), between picketing and other equally effective techniques for damaging the primary employer's business.

Nor may the Union elude this conclusion by relying on Section 8 (b) (4) (B). That is, the Union notes that, in forbidding, in Section 8 (b) (4) (B), secondary boycott activity designed to obtain recognition, Congress banned only inducement of strike action by neutral employees, and did not bar unions from making appeals directly to employers and consumers (br. 43-45). The Union then assumes that, since Section 8 (b) (4) (B) leaves open such appeals, Congress would not have reached them under any other provision of the statute, and thus its appeals in this case, being directed to other employers and consumers,⁴ must be lawful.

The fact that Congress in the secondary boycott provisions, including Section 8 (b) (4) (B), drew the line at strike action and did not proscribe appeals to the employers or consumers does not, as the Union assumes, necessarily determine the scope of Section 8 (b) (1) (A).⁵ First, as was true with Section 8 (b) (4) (C) (see *supra*), Section 8 (b) (4) (B) was in the bill before Section 8 (b) (1) (A) was adopted, and thus the conclusion is strong that the latter was intended to enlarge upon the scope of the preexisting

⁴ It may be questioned, however, whether the unfair list was not in part at least an employee appeal, rather than a pure consumer appeal, for the Union also inconsistently stresses that "it is fair to infer that * * * [the] readers [of the publication in which the 'We Do Not Patronize' list appeared] are principally workers" (br. 52).

⁵ The quotations from *Local 1976 v. N. L. R. B.*, 357 U. S. 93, relied on by the Union (br. 44, 46), discuss the problem only in the context of the secondary boycott provisions, the Court having no occasion to consider Section 8 (b) (1) (A).

provisions. Second, the secondary boycott provisions of the Act were intended to foreclose secondary activity irrespective of whether the union's ultimate demands were proper or, indeed, even if accession to them by the primary employer was required by the Act, e. g., recognition of a noncertified majority union. Thus, in leaving certain types of secondary action available to unions, the reasonable inference to be drawn is that Congress so intended only insofar as the ultimate objectives sought were themselves legitimate. See n. 2, *supra*, p. 5. Stated otherwise, it is not reasonable to infer, as does the Union, that the residual lawful area of secondary activity was meant to immunize conduct, which as we have shown with respect to the employer appeals and the "We Do Not Patronize" list here, seeks to further objectives which are clearly unlawful under the Act. Third, this Court, in *Capital Service*, has in effect already rejected the contention that consumer appeals, not covered by the secondary boycott provision, are necessarily lawful. For the secondary picketing there found to be violative of Section 8 (b) (1) (A) (at the customer entrances of the store) was deemed to be a consumer appeal, as distinguished from the delivery entrance picketing, which was an appeal to secondary employees and thus violative of Section 8 (b) (4) (A). See 204 F. 2d 848, 851-852, 854.

B. the Union's contention that its use of the "We Do Not Patronize" list and its appeals to Alloy's customers are constitutionally protected (br. pp. 47-52) is constructed on factual assumptions which are

contrary to the Board's findings in this case. Thus, the Union asserts that circulating the "We Do Not Patronize" list sought only the "performance of a lawful act" by Alloy's customers, and that in any event the "unimpeachable end" toward which the list was directed was "to inform the public that the Alloy Manufacturing Company do[es] not employ union help * * *" (Un. br. 48). The Board found, however, that the Union's appeals to Alloy's customers were not for this purpose or any of the other purposes hypothesized by the Union in its brief (pp. 48-51), but were in furtherance of the illegal goal of forcing Alloy to accord exclusive bargaining rights and a union-security agreement (R. 22, 21).⁶ Accordingly, the Union's constitutional argument must be considered in the light of these findings.

So viewed, the argument boils down to the contention that the Constitution guaranteed to the Union the right to use speech⁷ to induce Alloy's customers and others to boycott its products for the purpose of attaining the twin illegal objectives of exclusive recog-

⁶ The quotation in the Union's brief (p. 48), to the effect that its purpose in circulating the "We Do Not Patronize" list was simply to inform the public, is taken from a self-serving letter sent by the Union to Alloy in which it denied that recognition was its objective (R. 130). The Board, of course, found to the contrary, and we do not understand that the Union means to dispute the Board's finding in this regard. See Un. br. 53; Bd's. opening br. 12-15.

⁷ In this argument, the Union exempts its picketing activity, on the ground that picketing may be viewed as more than "speech," but asserts that appeals to customers and listing an employer on an unfair list are "pure speech" (Union br. 47).

dition and a union-security agreement.⁸ Manifestly, the Constitution affords no such license.

As we have shown in our opening brief (pp. 37-41), speech which is designed to further illegal acts is not protected by the First Amendment. The Supreme Court made this plain in *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490. There, in rejecting the contention that the union's efforts to elicit an agreement which would have violated the state anti-trust laws was privileged free speech because the union merely picketed with placards advertising that the company in dispute was selling ice to non-union firms, the Court stated (*Id.*, at 502): "But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from * * * control." See also, *Electrical Workers v. N. L. R. B.*, 341 U. S. 694, 704.

Nor is this principle rendered inapposite here by the Union's contention (br. 48) that, since it is "entirely legal for the customers to whom the appeal is addressed to withhold their patronage from Alloy," the "persuasion directed to them to do so seeks of them nothing but their performance of a lawful act." Even if the customers themselves could voluntarily decide to boycott Alloy, it does not follow that it would be lawful for the Union to induce such action.⁹ Indeed, assuming, as the constitutional argument must, that Sec-

⁸ The Union's argument drives it to conclude that even appeals in furtherance of an illegal union-shop are immune from regulation (see Union br. 53, n. 58; 54-55).

⁹ E. g., although Section 8 (b) (4) (A) does not prevent neutral employees, as individuals, from quitting work, it does proscribe union inducement of such work stoppages.

tion 8 (b) (1) (A) reaches boycott appeals in furtherance of a minority union's recognition objective, the Union's requests to customers and others not to buy Alloy's products would be as illegal as union requests directed to secondary employees (which would clearly be violative of Section 8 (b) (4) (A)). Moreover, accepting the union's premise that the appeals to the customers themselves were not unlawful, the fact remains that, on the Board's findings, they were designed to force Alloy to commit illegal acts. In these circumstances, the Union utilized speech to further an unlawful course of conduct no less than if it had appealed directly to Alloy to accede to its illegal demands. In short, the Union cannot obtain constitutional protection for conduct otherwise subject to regulation merely by enlisting an intermediary to further its illegal objective.

Similarly, there is no merit to the Union's further contention (br. 51-52) that, even if its customer appeals could possibly bring about a "substantive evil," there is no showing that they would do so with "that immediacy which would justify their suppression as a clear and present danger." The Board's interpretation of Section 8 (b) (1) (A) assumes that Congress made the judgment that there was a real likelihood that the public interest would be adversely affected if labor organizations remained free to blacklist an employer and make boycott appeals to his customers for the purpose of forcing him to recognize the union contrary to the wishes of his employees. If this conclusion is not beyond reason, Congress could curb the activity without requiring an individualized showing

of "danger" in each particular case. As the Supreme Court has pointed out: "[I]nsofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress. * * * [E]ven restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation.' " *A. C. A. v. Douds*, 339 U. S. 382, 400-401.

Preserving the right of employees to be free from coercion in their selection of a bargaining representative is certainly a matter of legitimate legislative concern. See *Building Service Employees Union v. Gazzam*, 339 U. S. 532; *Teamsters Union v. Vogt*, 354 U. S. 284. Cf. *Teamsters v. Hanke*, 339 U. S. 470; *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490. Moreover, an appeal to customers to boycott the employer with whom the union has its dispute has a clear and present propensity of effecting the coercion which Congress sought to avoid no less than the employee inducements proscribed in Section 8 (b) (4). Cf. *Electrical Workers v. N. L. R. B.*, 341 U. S. 694, 705. Accordingly, if the clear and present danger test may be deemed applicable to the conduct here, Congress, in enacting Section 8 (b) (1) (A), satisfied that test.

III. The contention that the Board's order is too broad

Finally, the Union contends that the Board's remedial order in this case is too broad in the light of the violations found (Un. br. 55-57). The portion

of the Board's order complained of requires the Union to cease and desist from "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the Act" (R. 24). The Union apparently would limit the scope of this provision to the specific picketing and customer appeals utilized by it in this case (br. 55-57). But it is settled that orders of the breadth of that in issue are proper where "the record disclose[s] persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future." *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 438; *N. L. R. B. v. Globe Wireless*, 193 F. 2d 748, 752 (C. A. 9); *N. L. R. B. v. Sunbeam Electric*, 133 F. 2d 856, 861-862 (C. A. 7); see *N. L. R. B. v. Jones Lumber Co.*, 245 F. 2d 388, 390 (C. A. 9). The order in this case is fully warranted under this principle. As shown in our opening brief (pp. 2-7, 13-15), the Union consistently displayed throughout the events in this case an utter disregard for the central policy of the Act that employees be guaranteed a free choice respecting matters of representation and union membership. To negate this fundamental principle, the Union sought by a variety of techniques—picketing, oral appeals to Alloy's customers, and circulation of the "We Do Not Patronize" list—to harm Alloy's business and thereby threaten the livelihood of its employees. The Board, in those circumstances, could reasonably conclude that the

Union's conduct reflected an intent to gain representation rights and a compulsory union membership agreement at any cost, and that a broad cease and desist order was therefore necessary. Cf. *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 192.¹⁰

CONCLUSION

For the foregoing reasons and those stated in the Board's opening brief, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

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OCTOBER 1958.

¹⁰ Cases in which this Court has stricken broad cease and desist orders entered by the Board (e. g., *N. L. R. B. v. California Date Growers Assoc.*, decided September 29, 1958, 42 LRRM 2805; *N. L. R. B. v. Shuck Construction Co.*, order modified May 16, 1957, 40 LRRM 2167) have involved violations which were not prompted by the kind of flagrant opposition to the Act's policies which the record reveals in this case.

No. 15818 ✓

United States
Court of Appeals
for the Ninth Circuit

PACIFIC GAMBLE-ROBINSON CO., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JAN 22 1938

PAUL P. WESTERN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Western
District of Washington, Northern Division

No. 4291

PACIFIC GAMBLE ROBINSON CO., a Corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF TAXES

Comes Now the Plaintiff, by its attorneys, Ryan,
Askren & Mathewson, and complains of the defend-
ant and alleges as follows:

First Count

I.

That the plaintiff, Pacific Gamble Robinson Co.,
at all times hereinafter mentioned was, and now is,
a corporation organized and existing under and by
virtue of the Laws of the State of Delaware; that
plaintiff's principal place of business is Seattle,
King County, State of Washington, within the
Western District of Washington, and within the
territorial jurisdiction of this Court; that this Court
has jurisdiction of this cause under the provisions
of Title 28, United States Code, Section 1346
(a) (1).

II.

That at all times herein mentioned, plaintiff conducted certain of its business in the State of Washington and other western states under the trade name and style of Pacific Fruit & Produce Co., and in the midwestern part of the United States under the trade name and style of Gamble-Robinson Company.

III.

That plaintiff has a claim against the defendant for the recovery of taxes paid on the transportation of property during a portion of the year 1950, and which taxes were erroneously and illegally collected under and by virtue of Section 3475 of the Internal Revenue Code (Section 620 (a), Revenue Code of 1942).

IV.

That during the period July through October, 1950, plaintiff had occasion to have certain of its products shipped to various points in the United States over the lines of certain carriers by rail; that during the period in question plaintiff's said products were shipped over the lines of fifteen (15) rail carriers, and the plaintiff paid said carriers in the Dominion of Canada transportation charges totaling \$2,683,949.64, of which amount the sum of \$78,937.17 represented the 3% tax imposed by Section 3475 of the Internal Revenue Code; that a recapitulation of said transportation charges, the transportation taxes paid thereon, the names of the fifteen (15) rail carriers to whom such charges and taxes were paid by plaintiff, the places in Canada

where plaintiff paid said charges and taxes, and the Collectors (now District Directors) of Internal Revenue of the Collection Districts to whom said carriers in turn paid said taxes, is set forth on Exhibit "A" attached hereto and by this reference made a part hereof.

V.

That during the period in question, and for all freight shipments which began prior to November 1, 1950, Section 3475 of the Internal Revenue Code covered the liability and the manner of the payment of the United States tax on the transportation of property, in the following language:

"(a) Tax—There shall be imposed upon the amount paid within the United States (emphasis added) after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except * * *

"(b) * * *—

"(c) Returns and Payment—The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the

preceding month, and pay the taxes so collected to the Collector in the district in which his principal place of business is located, * * *

VI.

That during the period aforesaid, plaintiff paid said transportation charges outside of the United States to said railroad carriers at their respective offices located in the cities of Vancouver and/or Winnipeg and/or Toronto, Canada, and, in addition, said railroad carriers wrongfully demanded and collected from the plaintiff, simultaneously with the collection of said transportation charges, the tax imposed on said charges, and all as set forth in Exhibit "A" attached hereto and made a part hereof; that as said transportation charges were paid outside of the United States, the taxes imposed and paid thereon were erroneously and illegally collected; that except for refunds of small amounts for overcharges received by plaintiff since January 1, 1951, for which plaintiff agrees to account, plaintiff has received no repayment of said taxes, or any part thereof, from any of said railroad carriers or from the defendant, and that plaintiff has not consented to the allowance of any credit or refund to any of said rail carriers.

VII.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue for the First District

of Illinois at Chicago 4, Illinois, the Collection District in which was located the principal place of business of the rail carriers Chicago and Northwestern Railway Company, whereby plaintiff claimed a refund of \$2,824.89, plus interest, representing the transportation taxes paid said rail carrier outside the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$2,824.89, together with interest as provided by law, that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Second Count

I.

That plaintiff realleges as though fully set forth herein, Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue for the First District of Illinois at Chicago 4, Illinois, the Collection District in which was located the principal place of business of the rail carrier Chicago, Burlington & Quincy Railroad Co., whereby plaintiff claimed a

refund of \$5,326.36, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$5,326.36, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Third Count

I.

That plaintiff realleges as though fully set forth herein, Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, for the First District of Illinois at Chicago 4, Illinois, the Collection District in which was located the principal place of business of the rail carrier Chicago, Milwaukee, St. Paul & Pacific Railroad Company, whereby plaintiff claimed a refund of \$5,507.65, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by

direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$5,507.65, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Fourth Count

I.

That plaintiff realleges as though fully set forth herein, Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, Denver, Colorado, the Collection District in which was located the principal place of business of the rail carrier, The Colorado and Southern Railway Company, whereby plaintiff claimed a refund of \$988.10, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on April 11, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$988.10, together with interest as provided by law; that plain-

tiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Fifth Count

I.

That plaintiff realleges as though fully set forth herein, Paragraph I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, St. Paul 1, Minnesota, the Collection District in which was located the principal place of business of the rail carrier, Great Northern Railway Company, whereby plaintiff claimed a refund of \$12,721.76, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$12,721.76, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Sixth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, St. Paul 1, Minnesota, the Collection District in which was located the principal place of business of the rail carrier Northern Pacific Railway Company, whereby plaintiff claimed a refund of \$16,697.42, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$16,697.42, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Seventh Count

I.

That plaintiff realleges as though fully set forth herein, Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, San Francisco 2, California, the Collection District in which was located the principal place of business of the rail carrier Southern Pacific Company, whereby plaintiff claimed a refund of \$5,562.17, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$5,562.17, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Eighth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, Portland 9, Oregon, the

Collection District in which was located the principal place of business of the rail carrier Spokane, Portland and Seattle Railroad Company, whereby plaintiff claimed a refund of \$806.03, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$806.03, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Ninth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, Omaha 2, Nebraska, the Collection District in which was located the principal place of business of the rail carrier Union Pacific Railroad Company, whereby plaintiff claimed a refund of \$9,633.71, plus interest, representing the transportation taxes paid said rail

carrier outside of the United States during the period above mentioned; that on December 23, 1954, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$9,633.71, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Tenth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue for the First District of Illinois, Chicago 4, Illinois, the Collection District in which was located the principal place of business of the rail carrier Illinois Central Railroad, whereby plaintiff claimed a refund of \$1,915.51, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for re-

fund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$1,915.51, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Eleventh Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, St. Paul 1, Minnesota, the Collection District in which was located the principal place of business of the rail carrier Chicago, St. Paul, Minneapolis & Omaha Railway Company, whereby plaintiff claimed a refund of \$7,251.39, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$7,251.39, together with interest as provided by law; that plaintiff is and al-

ways has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Twelfth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue for the First District of Illinois at Chicago 4, Illinois, the Collection District in which was located the principal place of business of the rail carrier Chicago Great Western Railway Company, whereby plaintiff claimed a refund of \$2,885.88, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$2,885.88, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Thirteenth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue for the First District of Illinois at Chicago 4, Illinois, the Collection District in which was located the principal place of business of the rail carrier Chicago, Rock Island and Pacific Railroad Company, whereby plaintiff claimed a refund of \$2,672.22, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$2,672.22, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Fourteenth Count

I.

That plaintiff realleges as though fully set forth herein Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, St. Paul 1, Minnesota, the Collection District in which was located the principal place of business of the rail carrier Minneapolis, St. Paul & Sault Ste. Marie R.R. Co., whereby plaintiff claimed a refund of \$1,392.24, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$1,392.24, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Fifteenth Count

I.

That plaintiff re-alleges as though fully set forth herein, Paragraphs I through VI of its First Count.

II.

That pursuant to the provisions of the Internal Revenue Code, plaintiff on June 28, 1954, duly filed a claim for refund, Form 843, with the District Director of Internal Revenue, St. Paul 1, Minne-

sota, the Collection District in which was located the principal place of business of the rail carrier, The Minneapolis & St. Louis Railway Company, whereby plaintiff claimed a refund of \$2,751.84, plus interest, representing the transportation taxes paid said rail carrier outside of the United States during the period above mentioned; that on October 6, 1955, by direction of the Commissioner of Internal Revenue, said claim for refund was by letter rejected in full, and, by virtue thereof, defendant has become and is indebted to plaintiff in said sum of \$2,751.84, together with interest as provided by law; that plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Wherefore, plaintiff prays for judgment against the defendant as follows:

(1) Upon each of its fifteen (15) counts herein, in the following amounts:

(a)	First Count	\$ 2,824.89
(b)	Second Count	\$ 5,326.36
(c)	Third Count	\$ 5,507.65
(d)	Fourth Count	\$ 988.10
(e)	Fifth Count	\$12,721.76
(f)	Sixth Count	\$16,697.42
(g)	Seventh Count	\$ 5,562.17
(h)	Eighth Count	\$ 806.03
(i)	Ninth Count	\$ 9,633.71
(j)	Tenth Count	\$ 1,915.51
(k)	Eleventh Count	\$ 7,251.39

- (l) Twelfth Count\$ 2,885.88
- (m) Thirteenth Count\$ 2,672.22
- (n) Fourteenth Count\$ 1,392.24
- (o) Fifteenth Count\$ 2,751.84

(2) Together with interest on each of said above amounts as provided by law in like cases;

(3) Together with its costs and disbursements herein to be taxed; and

(4) Together with such other and further relief as is just in the premises.

RYAN, ASKREN & MATHEW-
SON

By /s/ LAURANCE S. CARLSON,
Of Attorneys for Plaintiff.

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PACIFIC GAMBLE ROBINSON CO.
RECAPITULATION OF TRANSPORTATION TAXES PAID

IN CANADA

(Refunds for Overcharges Accounted for through December 31, 1930)

	<u>PACIFIC FRUIT AND PRODUCE CO.</u>			<u>GAMBLE ROBINSON CO.</u>			<u>CONSOLIDATION</u>		
	<u>Freight</u>	<u>Tax</u>	<u>Total</u>	<u>Freight</u>	<u>Tax</u>	<u>Total</u>	<u>Freight</u>	<u>Tax</u>	<u>Total</u>
1. CHICAGO AND NORTHWESTERN RAILWAY COMPANY 400 West Madison Street, Chicago 5, Ill. Collector of Internal Revenue First District Illinois, Chicago 4, Illinois									
Spokane City, South Dakota Branch - Vancouver	\$30,880.86	\$918.87	\$31,800.83						
Pacific Fruit and Produce Co. Total	30,880.86	918.87	31,800.83						
Gamble Robinson Co. - all branches - Winnipeg				\$52,835.24	\$1,808.52	\$54,743.86	\$94,416.20	\$2,624.89	\$97,041.09
2. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. 847 West Jackson Blvd., Chicago 5, Ill. Collector of Internal Revenue First District Illinois, Chicago 4, Illinois									
Scottsbluff, Nebraska Branch - Vancouver	13,944.86	418.22	14,363.08						
Casper, Wyoming Branch - Vancouver	20,685.85	614.79	21,300.65						
Pacific Fruit and Produce Co. Total	34,630.71	1,033.11	35,663.82						
Gamble Robinson Co. - all branches - Winnipeg				148,142.68	4,268.25	152,410.93	177,770.63	5,322.86	183,093.49
3. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY 816 West Jackson Blvd., Chicago 5, Ill. Collector of Internal Revenue First District Illinois, Chicago 4, Illinois									
Seattle, Washington Branch - Vancouver	542.70	17.45	560.15						
Port Angeles, Washington Branch - Vancouver	1,674.88	47.22	1,722.10						
Brewett, Washington Branch - Vancouver	1,007.85	30.24	1,038.09						
Spokane, Washington Branch - Vancouver	121.62	3.66	125.28						
Tacoma, Washington Branch - Vancouver	1,040.61	31.47	1,072.08						
Missoula, Montana Branch - Vancouver	1,453.99	42.82	1,496.81						
Pacific Fruit and Produce Co. Total	5,791.88	173.73	5,965.61						
Gamble Robinson Co. - all branches - Winnipeg				177,688.65	5,232.99	182,921.64	183,488.63	5,607.66	189,096.29
4. THE COLORADO AND SOUTHERN RAILWAY COMPANY C. L. Johnson Building, Denver, Colorado Collector of Internal Revenue, Denver, Colorado Cheyenne, Wyoming Branch - Vancouver	\$2,185.45	\$68.10	\$2,253.55						
Pacific Fruit and Produce Co. Total	2,185.45	68.10	2,253.55						
5. GREAT NORTHERN RAILWAY COMPANY 175 East Fourth Street, St. Paul 1, Minnesota Collector of Internal Revenue 180 East Kellogg Blvd., St. Paul 1, Minnesota									
Seattle, Washington Branch - Vancouver	16,980.64	\$97.98	17,078.62						
Centralia, Washington Branch - Vancouver	45.00	1.29	46.29						
Elko, Washington Branch - Vancouver	186.58	6.94	193.52						
St. Vrain, Washington Branch - Vancouver	1,607.68	66.18	1,673.86						
Wentworth, Washington Branch - Vancouver	8,675.09	170.17	8,845.26						
Brewett, Washington Branch - Vancouver	4,942.28	144.80	5,087.08						
Tacoma, Washington Branch - Vancouver	8,680.37	107.40	8,787.77						
Bellingham, Washington Branch - Vancouver	3,867.63	86.04	3,953.67						
Spokane, Washington Branch - Vancouver	24,808.09	747.09	25,555.18						
Portland, Oregon Branch - Vancouver	187.54	5.62	193.16						

PACIFIC GAMBLE ROBINSON CO.
RECAPITULATION OF TRANSPORTATION TAXES PAID
IN CANADA

(Returns for Overcharges Accounted for through December 31, 1960)

Page 2

PACIFIC FRUIT AND PRODUCE CO.				GAMBLE ROBINSON CO.			CONSOLIDATION		
	Freight	Tax	Total	Freight	Tax	Total	Freight	Tax	Total
Bend Oregon, Branch - Vancouver	\$ 1,889.78	\$ 47.18	\$ 1,936.96						
Klamath Falls, Oregon Branch - Vancouver	1,067.31	31.71	1,099.02						
Kellogg, Wartana Branch - Vancouver	9,371.23	278.18	9,649.41						
Pacific Fruit and Produce Co. Total	78,744.18	2,181.06	80,925.24						
Gamble Robinson Co. - all branches - Winnipeg				\$581,889.70	\$10,640.74	\$592,530.44	\$424,418.88	\$15,721.78	\$440,140.66
6. NORTHERN PACIFIC RAILWAY COMPANY									
214 and Jackson Street, St. Paul 1, Minnesota Collector of Internal Revenue 180 East Kellogg Blvd., St. Paul 1, Minnesota									
Seattle, Washington Branch - Vancouver	180,847.78	\$,811.80	181,659.58						
Tacoma, Washington Branch - Vancouver	18,732.88	508.81	19,241.69						
Everett, Washington Branch - Vancouver	8,120.78	88.68	8,209.46						
Spokane, Washington Branch - Vancouver	28,747.68	800.84	29,548.52						
Pullman, Washington Branch - Vancouver	4,884.13	140.79	5,024.92						
Yakima, Washington Branch - Vancouver	9,881.04	280.78	10,161.82						
Bellingham, Washington Branch - Vancouver	2,838.81	88.18	2,926.99						
Ellensburg, Washington Branch - Vancouver	886.06	20.88	906.94						
Nedra Weasley, Washington Branch - Vancouver	879.88	11.88	891.76						
Shawto, Washington Branch - Vancouver	1,883.68	88.00	1,971.68						
Centralia, Washington Branch - Vancouver	8,841.28	148.27	8,989.55						
Kelso, Washington Branch - Vancouver	2,088.97	88.79	2,177.76						
Walla Walla, Washington Branch - Vancouver	7,814.88	219.88	8,034.76						
Aberdeen, Washington Branch - Vancouver	8,870.81	287.14	9,157.95						
Pendleton, Oregon Branch - Vancouver	791.08	28.78	819.86						
Medford, Idaho Branch - Vancouver	4,881.84	121.88	5,003.72						
Lewiston, Idaho Branch - Vancouver	1,010.84	80.20	1,091.04						
Missoula, Montana Branch - Vancouver	8,118.88	247.12	8,366.00						
Pacific Fruit and Produce Co. Total	218,781.08	7,139.84	225,920.92						
Gamble Robinson Co. - all branches - Winnipeg				\$17,336.84	\$,887.88	\$18,224.72	\$18,487.88	\$,887.88	\$19,375.76
7. SOUTHERN PACIFIC COMPANY									
68 Market Street, San Francisco 8, California Collector of Internal Revenue - San Francisco 8, Calif.									
Portland, Oregon Branch - Vancouver	88,781.88	2,081.88	90,863.76						
Eugene, Oregon Branch - Vancouver	22,114.88	88.80	22,203.68						
Medford, Oregon Branch - Vancouver	10,404.88	488.11	10,892.99						
Reeseburg, Oregon Branch - Vancouver	8,881.01	208.89	9,089.90						
Corvallis, Oregon Branch - Vancouver	9,783.18	281.87	10,065.05						
Albany, Oregon Branch - Vancouver	8,204.84	247.07	8,451.91						
Salmon, Oregon Branch - Vancouver	28,818.87	888.84	29,707.71						
Coos Bay, Oregon Branch - Vancouver	14,884.88	447.80	15,332.68						
Klamath Falls, Oregon Branch - Vancouver	7,781.87	288.81	8,070.68						
Oregon, Wash Branch - Vancouver	1,880.80	47.70	1,928.50						
Pacific Fruit and Produce Co. Total	188,808.17	6,888.17	195,696.34						
Gamble Robinson Co. - all branches - Winnipeg				\$18,803.17	\$,888.17	\$19,691.34	\$18,803.17	\$,888.17	\$19,691.34
8. SPokane, Portland and Seattle Railroad Company									
Post Office Box 818, Portland 7, Oregon Collector of Internal Revenue Customs House, Portland 8, Oregon									
Spokane, Washington Branch - Vancouver	8,888.77	108.07	8,996.84						
Portland, Oregon Branch - Vancouver	18,888.81	848.01	19,736.82						
Astoria, Oregon Branch - Vancouver	8,088.88	181.88	8,270.76						
Pacific Fruit and Produce Co. Total	35,866.46	806.08	36,672.54						
Gamble Robinson Co. - all branches - Winnipeg				\$18,803.17	\$,888.17	\$19,691.34	\$18,803.17	\$,888.17	\$19,691.34

PACIFIC SANKLE ROBINSON CO.
RECAPITULATION OF TRANSPORTATION TAXES PAID

IN CANADA

Page 4

(Refunds for Overcharges Accounted for through December 31, 1960)

9. UNION PACIFIC RAILROAD COMPANY		PACIFIC FRUIT AND PRODUCE CO.			GAMBLE ROBINSON CO.			CONSOLIDATION		
		Freight	Tax	Total	Freight	Tax	Total	Freight	Tax	Total
1014 Bodge Street, Omaha 5, Nebraska Collector of Internal Revenue 1820 Douglas Street, Omaha 5, Nebraska										
Seattle, Washington Branch	- Vancouver	\$7,196.79	\$396.76	\$7,593.55						
		140.68	6.88	150.50						
Vacoma, Washington Branch	- Vancouver	2,086.06	21.08	2,107.14						
Spokane, Washington Branch	- Vancouver	6,886.12	180.86	7,066.98						
Takoma, Washington Branch	- Vancouver	8,016.79	80.80	8,107.59						
Walla Walla, Washington Branch	- Vancouver	16,286.04	\$70.70	16,356.74						
Pullama, Washington Branch	- Vancouver	6,267.90	157.77	6,425.73						
Aberdeen, Washington Branch	- Vancouver	3,138.41	93.76	3,232.17						
Centralia, Washington Branch	- Vancouver	2,241.40	87.66	2,329.06						
Kelso, Washington Branch	- Vancouver	646.82	36.40	673.22						
Portland, Oregon Branch	- Vancouver	11,488.68	\$43.37	11,796.23						
Sahar, Oregon Branch	- Vancouver	2,806.23	\$4.37	2,850.70						
Seas, Oregon Branch	- Vancouver	816.03	24.84	840.86						
La Grande, Oregon Branch	- Vancouver	728.79	22.61	751.40						
Tanderton, Oregon Branch	- Vancouver	1,221.72	37.05	1,258.77						
Boise, Idaho Branch	- Vancouver	26,267.02	786.47	27,053.49						
Wallace, Idaho Branch	- Vancouver	864.89	17.94	882.83						
Lewiston, Idaho Branch	- Vancouver	8,211.11	284.47	8,795.58						
Idaho Falls, Idaho Branch	- Vancouver	19,095.65	\$67.23	19,162.88						
Coastville, Idaho Branch	- Vancouver	6,131.02	104.13	6,235.15						
Twin Falls, Idaho Branch	- Vancouver	7,546.49	217.93	7,764.42						
Cheyenne, Wyoming Branch	- Vancouver	16,161.94	\$45.78	16,797.19						
Rock Springs, Wyoming Branch	- Vancouver	1,234.43	27.06	1,261.48						
Laramie, Wyoming Branch	- Vancouver	8,728.98	61.78	8,807.94						
Rawlins, Wyoming Branch	- Vancouver	6,129.73	128.68	6,258.41						
Salt Lake City, Utah, Branch	- Vancouver	22,806.12	896.58	23,602.70						
Ogden, Utah Branch	- Vancouver	2,067.48	81.94	2,149.40						
Provo, Utah Branch	- Vancouver	9,826.98	\$45.58	9,872.51						
Logan, Utah Branch	- Vancouver	7,944.27	227.29	8,171.56						
Denver, Colorado Branch	- Vancouver	505.19	17.49	522.68						
Pacific Fruit and Produce Co. Total		208,219.64	8,840.71	217,060.35						
Gamble Robinson Co. - all branches	- Toronto				\$107,886.84	\$8,284.27	\$116,171.61			
Gamble Robinson Co. - all branches	- Winnipeg				1,187.87	\$4.78	1,192.65			
Gamble Robinson Co. - Total					1108,098.61	\$8,289.05	1116,387.66	\$216,419.87	\$8,289.71	\$224,709.58
10. ILLINOIS CENTRAL RAILROAD										
138 East Wackerly Place, Chicago 5, Illinois Collector of Internal Revenue First District Illinois, Chicago 5, Illinois										
Gamble Robinson Co. - all branches	- Toronto				68,844.18	1,218.51	69,769.69	68,844.18	1,218.61	69,769.69
11. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY										
174 East 4th St., St. Paul, Minnesota Collector of Internal Revenue 180 East Kellogg Blvd., St. Paul 1, Minnesota										
Gamble Robinson Co. - all branches	- Winnipeg				241,888.51	7,261.59	249,150.70	241,888.51	7,261.59	249,150.70

PACIFIC GAMBLE ROBINSON CO.
RECAPITULATION OF TRANSPORTATION TAXES PAID
IN CANADA

(Refunds for Overcharges Accounted for through December 31, 1960)

	<u>PACIFIC FRUIT AND PRODUCE CO.</u>			<u>GAMBLE ROBINSON CO.</u>			<u>CONSOLIDATION</u>		
	<u>Freight</u>	<u>Tax</u>	<u>Total</u>	<u>Freight</u>	<u>Tax</u>	<u>Total</u>	<u>Freight</u>	<u>Tax</u>	<u>Total</u>
12. CHICAGO GREAT WESTERN RAILWAY COMPANY 309 West Jackson Bldg., Chicago 6, Illinois Collector of Internal Revenue First District Illinois, Chicago 4, Illinois Gamble Robinson Co. - all branches - Winnipeg				\$88,066.10	\$2,858.88	\$90,924.98	\$88,066.10	\$2,858.88	\$90,924.98
13. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY La Salle Street Station, Chicago, Illinois Collector of Internal Revenue First District Illinois, Chicago 4, Illinois Gamble Robinson Co. - all branches - Winnipeg				88,289.10	2,678.22	90,967.32	88,289.10	2,678.22	90,967.32
14. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE R.R. CO. First National - See Lane Bldg., Minneapolis, Minn. Collector of Internal Revenue 180 East Kellogg Blvd., St. Paul 1, Minnesota Gamble Robinson Co. - all branches - Winnipeg				46,408.27	1,392.24	47,800.51	46,408.27	1,392.24	47,800.51
15. THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY Northwestern Bank Bldg., Minneapolis, Minn. Collector of Internal Revenue 180 East Kellogg Blvd., St. Paul 1, Minnesota Gamble Robinson Co. - all branches - Winnipeg				88,007.84	2,761.84	90,769.68	88,007.84	2,761.84	90,769.68
GRAND TOTALS	\$812,610.10	\$26,164.28	\$838,774.38	\$1,798,202.37	\$63,772.69	\$1,861,975.06	\$2,608,012.47	\$79,937.17	\$2,687,949.64

RECAPITULATION OF TAX PAID IN EACH COLLECTOR'S DISTRICT

<u>R.R. Reference No.</u>	<u>Collector's District</u>	<u>Amount of Tax Paid</u>
(5) (6) (11) (14) (15)	St. Paul, Minnesota	\$ 40,614.68
(1) (2) (3) (10) (12) (13)	Chicago, Illinois	21,182.61
(9)	Ottawa, Nebraska	9,683.71
(7)	San Francisco, California	2,922.17
(4)	Denver, Colorado	989.10
(8)	Portland, Oregon	808.08
	TOTAL TAX PAID	\$ 76,987.17

[Endorsed]: Filed Dec. 17, 1956.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, by its attorney, Charles P. Moriarty, United States Attorney for the Western District of Washington, and for answer to the complaint filed herein admits, denies and alleges:

First Count

1. Admits the allegations contained in paragraph I of the complaint.
2. Admits the allegations contained in paragraph II of the complaint.
3. Denies the allegations contained in paragraph III of the complaint.
4. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the complaint.
5. Admits the allegations contained in paragraph V of the complaint.
6. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph VI of the complaint. Denies that any taxes were erroneously or illegally imposed or collected from plaintiff.
7. Defendant is presently without information or knowledge sufficient to form a belief as to the

truth of the allegations contained in paragraph VII of the complaint. Denies it is indebted to plaintiff in the sum of \$2,824.89, or any sum.

Second Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the second count of the complaint. Denies it is indebted to plaintiff in the sum of \$5,326.36, or any sum.

Third Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the third count of the complaint. Denies it is indebted to plaintiff in the sum of \$5,507.65, or any sum.

Fourth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the

truth of the allegations contained in paragraph II of the fourth count of the complaint. Denies it is indebted to plaintiff in the sum of \$988.10, or any sum.

Fifth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the fifth count of the complaint. Denies it is indebted to plaintiff in the sum of \$12,721.76, or any sum.

Sixth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the sixth count of the complaint. Denies it is indebted to plaintiff in the sum of \$16,697.42, or any sum.

Seventh Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the

truth of the allegations contained in paragraph II of the seventh count of the complaint. Denies it is indebted to plaintiff in the sum of \$5,562.17, or any sum.

Eighth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the eighth count of the complaint. Denies it is indebted to plaintiff in the sum of \$806.03, or any sum.

Ninth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the ninth count of the complaint, except admits that plaintiff filed a claim for refund for \$9,633.71 on July 28, 1954, with the District Director of Internal Revenue at Omaha, Nebraska. Denies defendant is indebted to plaintiff in the sum of \$9,633.71, or any amount.

Tenth Count

1. Defendant re-alleges and incorporates herein

by reference its answers to pargaraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the tenth count of the complaint. Denies it is indebted to plaintiff in the sum of \$1,915.51, or any sum.

Eleventh Count

1. Defendant re-alleges and incorporates herein by reference its answers to pargaraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the eleventh count of the complaint. Denies it is indebted to plaintiff in the sum of \$7,251.39, or any sum.

Twelfth Count

1. Defendant re-alleges and incorporates herein by reference its answers to pargaraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the twelfth count of the complaint. Denies it is indebted to plaintiff in the sum of \$2,885.88, or any sum.

Thirteenth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the thirteenth count of the complaint. Denies it is indebted to plaintiff in the sum of \$2,672.22, or any sum.

Fourteenth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the fourteenth count of the complaint. Denies it is indebted to plaintiff in the sum of \$1,392.24, or any sum.

Fifteenth Count

1. Defendant re-alleges and incorporates herein by reference its answers to paragraphs I through VI of the first count of the complaint.

2. Defendant is presently without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph II of the fifteenth count of the complaint. Denies it is indebted to plaintiff in the sum of \$2,751.84, or any sum.

Wherefore, having fully answered the complaint filed herein, defendant moves this Court to dismiss, with prejudice, with costs thereof paid by plaintiffs.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ THOMAS R. WINTER,
Sp. Asst. to Regional Counsel,
Internal Revenue Service.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1957.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Agreed by and between the parties hereto, acting through their respective attorneys, that the facts hereinafter set forth are true, and may be received in evidence, and that the documents attached hereto and made a part hereof are true copies and may be considered to be in evidence herein, subject only to the provisions of paragraph 16, hereinafter.

1. The plaintiff, Pacific Gamble Robinson Co. (hereinafter referred to as "Pacific"), was at all times mentioned herein and it now is a Delaware corporation, with its principal place of business in Seattle, King County, Washington. This Court has jurisdiction of the cause under the provisions of Title 28, United States Code, Sec. 1346(a)(1).

2. At all times mentioned herein, Pacific was engaged in the wholesaling of fresh fruits and vegetables and processed food stuffs in the United States, as well as through subsidiaries in Canada. It conducted its business in the State of Washington and other western states under the trade name and style of "Pacific Fruit & Produce Co.," and in the midwestern part of the United States under the trade name and style of "Gamble-Robinson Company." The main offices of Pacific were maintained at Seattle, Washington, for operations conducted under the name of "Pacific Fruit & Produce Co." and at Minneapolis, Minnesota, for operations conducted under the name of "Gamble-Robinson Company." Branch offices of Pacific Fruit & Produce Company receiving transportation services hereinafter mentioned were maintained in various cities in Colorado, Idaho, part of Montana, part of Nebraska, Oregon, part of South Dakota, Washington, Wyoming and Utah. Branch offices of Gamble-Robinson Company receiving such services were maintained in Iowa, Michigan, Minnesota, parts of Montana and Nebraska, North Dakota, part of South Dakota, Wisconsin, and part of Wyoming.

3. During the period, July through November, 1950, Pacific received from the Chicago and Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Co.; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; The Colorado and Southern Railway Company, Great Northern Railway Company, Northern Pacific Railway Company,

Southern Pacific Company, Spokane, Portland and Seattle Railroad Company; Union Pacific Railroad Company, Illinois Central Railroad, Chicago, St. Paul, Minneapolis & Omaha Railway Company; Chicago Great Western Railway Company, Chicago, Rock Island and Pacific Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie R. R. Co., and The Minneapolis & St. Louis Railway Company (hereinafter referred to collectively as "railroad companies"), freight bills mentioned hereinbelow, representing charges incurred by Pacific upon transportation of produce and other property upon the rail lines of the said railroad companies from one point in the United States to another, which originated between June 30, 1950 and October 31, 1950. In each instance, the said freight bills were incurred by Pacific, were its obligations, and were required to be paid by it. The said transportation took place mainly between producers and packers of produce and foods, and branches of Pacific, although a few shipments were between branches of Pacific. The transportation was mainly in interstate commerce, although a small amount was intrastate, and all payments herein mentioned were made to railroad companies regulated by the Interstate Commerce Commission of the United States. The said freight bills were required, under ICC regulations, to be paid within 96 hours of receipt and were in each instance paid within that time. Each of the railroad companies concerned maintained offices at various places in the United States, including Seattle, Washington; Minneapolis, Minnesota, and

other cities at which Pacific maintained branch offices, at which the said bills could have been paid, and they also maintained offices in Canada, as hereinafter more particularly specified.

4. During the aforesaid period, Pacific paid, in the manner specified in paragraphs 5, 6 and 7, below, freight bills of the said railroad companies on shipments of property originating between June 30, 1950 and October 31, 1950, aggregating \$2,605,-012.47, together with the three per cent (3%) tax specified in Section 3475(a) of the Internal Revenue Code of 1939, as amended, on the said freight bills, totaling \$78,937.17, which Pacific was required to pay by the said railroad companies. The said payments were made to the respective railroad companies in the amounts set forth in plaintiff's Exhibit 1, which is attached hereto.

There are attached hereto plaintiff's Exhibits 2 through 10, which are photocopies of the original checks used to pay certain of the said freight bills, together with the freight bills in payment of which they were issued, and plaintiff's Exhibits 11 through 16, which are photocopies of office copies of checks together with the freight bills in payment of which they were issued. All other checks paid to each of the aforesaid railroad companies and the freight bills in payment of which they were issued were in substantially the same form as the examples pertaining to such railroad company. The said photocopies are true copies which may be received in evidence in lieu of all the originals,

and may be given the same force and probative effect as would be given all the original checks and freight bills pertaining to the payments herein above mentioned. (Retained office copies have been used where originals were not in existence.)

5. Checks and freight bills totaling \$812,810.10, together with the three per cent (3%) transportation tax thereon totaling \$25,164.28 were remitted to the offices of the respective railroad companies in Vancouver, B. C., Canada, in the following manner:

(a) Pacific's office in Seattle, Washington, upon receipt of the above-mentioned freight bills from time to time from the respective branches of Pacific Fruit & Produce Company, as set forth in plaintiff's Exhibit 1, drew checks upon Pacific's account in either the National Bank of Commerce or Seattle-First National Bank, both of Seattle, Washington, payable to the respective railroad companies in the amount of one or more freight bills, including the three per cent (3%) transportation tax thereon.

(b) The said checks, together with the freight bills pertaining thereto, were mailed to representatives of Pacific in care of Slade & Stewart, Ltd., 454 Prior Street, Vancouver, B. C., which was at all times mentioned in the complaint a subsidiary of Pacific. The said representatives of Pacific who resided in Vancouver, B. C., and the dates during which they so served follow:

Robert J. Wood, July 6, 1950, to August 27, 1950.

William Richmond, August 28, 1950, to October 20, 1950.

F. J. Bates, October 31, 1950, to November 16, 1950.

(c) Upon the dates or during the periods stated after, who were instructed and authorized by Pacific to do so on its behalf, their names, the said representatives of Pacific delivered the said freight bills and checks during regular business hours to the duly authorized agents of the railroad companies concerned at their respective offices in Vancouver, B. C.

(d) The said agents of the railroad companies, on behalf of their respective principals, accepted the said checks in Vancouver, B. C., then and there marked the freight bills with an ink stamp, showing the word "Paid," or words to the same effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to the representatives. The said tax so collected was paid by each of the railroad companies concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. The said checks were in due course presented to the banks upon which they were drawn, and were honored by them. At all times after the said checks were issued, and until they were paid, there were sufficient funds in Pacific's account in the said banks to pay them.

(c) Upon the dates or during the periods stated after their names, the said representatives of Pacific, who were instructed and authorized by Pacific to do so on its behalf, delivered the said freight bills and checks during regular business hours to the duly authorized agents of the railroad companies concerned at their respective offices in Vancouver, B. C.

(e) The salaries of the said representatives of Pacific were paid in part by Slade & Stewart, Ltd., by which they were also employed, and in part by Pacific. The aforesaid functions of the said representatives were the only functions performed by them for Pacific.

6. Checks and freight bills totaling \$1,620,321.98, together with the three per cent (3%) tax thereon totaling \$48,619.11, were remitted to the offices of the respective railroad companies in Winnipeg, Manitoba, Canada, in the following manner:

(a) Pacific's office in Minneapolis, Minnesota, upon receipt from time to time of the above-mentioned freight bills from the branch offices of Gamble-Robinson Company, drew checks upon its account in the Northwestern National Bank, Minneapolis, Minnesota, to the respective railroad companies, in the amount of one or more freight bills, including the three per cent (3%) transportation tax thereon.

(b) The said checks, together with the freight bills to which they pertained, were mailed to A. A. McGibbon, P. O. Box 696, Winnipeg, Manitoba, Canada, who resided in the said city. The said A. A. McGibbon was employed by Pacific for the sole purpose of paying the said freight bills.

(c) The said freight bills and checks were delivered by the said A. A. McGibbon, who was instructed and authorized by Pacific to do so on its behalf, during regular business hours to the duly-

authorized agents of the railroad companies concerned at their respective offices in Winnipeg, Manitoba.

(d) The said agents of the railroad companies, on behalf of their respective principals, accepted the said checks in Winnipeg, Manitoba, then and there marked the freight bills with an ink stamp, showing the word "Paid," or words to the same effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to the said A. A. McGibbon. The said tax so collected was paid by each of the railroad companies concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. The said checks were, in due course, presented to the bank upon which they were drawn, and were honored by it. At all times after the said checks were issued, and until they were paid, there were sufficient funds in Pacific's account in the said bank to pay them.

(e) The salary of the said A. A. McGibbon was paid by Pacific.

7. Checks and freight bills totaling \$171,880.39, together with the three per cent (3%) transportation tax thereon totaling \$5,153.78, were remitted to the offices of the respective railroad companies in Toronto, Ontario, Canada, in the following manner:

(a) Pacific's office in Minneapolis, Minnesota, upon receipt from time to time of the above-mentioned freight bills from the branch offices of

Gamble-Robinson Company, drew checks upon its account in the Northwestern National Bank, Minneapolis, Minnesota, to the respective railroad companies, in the amount of one or more freight bills, including the three per cent (3%) transportation tax thereon.

(b) The said checks, together with the freight bills to which they pertained, were mailed to Peter McKercher, P. O. Box 313, Toronto, Ontario, Canada. The said Peter McKercher resided in Toronto, Ontario, and was an employee of Gamble-Robinson, Ltd., a subsidiary of Pacific with offices in Toronto, Ontario.

(c) The said freight bills and checks were delivered by the said Peter McKercher, who was instructed and authorized by Pacific to do so on its behalf, during regular business hours to the duly-authorized agents of the railroad companies concerned, at their respective offices in Toronto, Ontario.

(d) The said agents of the railroad companies, on behalf of their respective principals, accepted the said checks during regular business hours in Toronto, Ontario, then and there marked the freight bills with an ink stamp, showing the word "Paid," or words to the same effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to the said Peter McKercher. The said tax so collected was paid by each of the railroad companies concerned to

the Collector of Internal Revenue in the district in which it had its principal place of business. The said checks were, in due course, presented to the bank upon which they were drawn and were honored by it. At all times after the said checks were issued, and until they were paid, there were sufficient funds in Pacific's account in the said bank to pay them.

(e) The salary of the said Peter McKercher was paid by Gamble-Robinson, Ltd., and the aforesaid functions were performed by him in addition to other duties.

8. Pacific, within the time prescribed by law, to wit, on June 28, 1954, filed with each District Director of Internal Revenue for the Collection District in which any of the aforesaid railroad companies had its principal place of business, as shown in plaintiff's Exhibit 1, a separate claim on Treasury Department Form 843, for refund of the taxes paid by Pacific to such railroad company, asserting that the amounts paid by Pacific to such railroad company for transportation of property were not taxable under Section 3475 of the Internal Revenue Code of 1939, as amended, or at all, and were illegally collected, since such amounts were not paid within the United States. These claims were prepared and filed in the manner and form required by and in accordance with the provisions of Section 3313 of the Internal Revenue Code of 1939, as amended, and Regulation 113, Section 143.61. All of the said claims were denied in full by the Com-

missioner of Internal Revenue, through his designated agents, by notice of disallowance by registered mail to Pacific, in accordance with the provisions of Section 3772(a)(2) of the Internal Revenue Code of 1939. All of the said notices were mailed Pacific on October 6, 1955, except the notice denying the claim for refund of taxes paid to the Union Pacific Railroad Company, which was so mailed on December 23, 1954, and that notice denying the claim for the refund of taxes paid to the Colorado and Southern Railway Company, which was so mailed on April 11, 1955.

9. On December 7, 1942, the Commissioner of Internal Revenue, Guy T. Helvering, issued a Mimeograph letter (MIM.5447, 1942-2 Cum. Bull. p. 280), dated December 7, 1942, to the Collectors of Internal Revenue and others concerned. A photocopy of said Mimeograph letter is Defendant's Exhibit A.

10. On September 2, 1949, the Treasury Department of the United States issued Treasury Department Press Release S-2100, dated Friday, September 2, 1949. A photocopy of said Press Release S-2100 is Defendant's Exhibit B.

11. On April 11, 1950, the acting Commissioner of Internal Revenue, Fred S. Martin, issued a letter ruling MT:M:CTD dated April 11, 1950, to the Northwest Fish Traffic Committee. A photocopy of said letter ruling MT:M:CTD is Defendant's Exhibit C.

12. On June 28, 1950, Deputy Commissioner of Internal Revenue, Charles J. Valaer, issued a letter ruling dated June 28, 1950, to the National Industrial Traffic League. A photocopy of said letter ruling is Defendant's Exhibit D.

13. On July 7, 1950, the Treasury Department of the United States issued Treasury Department Press Release S-2389, dated Friday, July 7, 1950. A photocopy of said Press Release S-2389, dated Friday, July 7, 1950, is Defendant's Exhibit E.

14. No repayment of any of the taxes referred to hereinabove or any part of such taxes ever has been made to plaintiff by any of the railroad companies collecting the same, nor has Pacific otherwise recovered said taxes or any part thereof. Pacific has not consented to the allowance of credit or refund of such taxes, in whole or in part, to any of the said railroad companies.

15. Pacific is and always has been the sole and absolute owner of its aforesaid claims, and no transfer or assignment of said claims or any part thereof has ever been made.

16. The right is reserved by both parties to introduce other and further evidence not inconsistent with this stipulation at the time of trial, and to object to the relevancy or materiality of any of the exhibits hereinabove identified and described. The objection that an exhibit is a copy and not the original is waived. A list of said Exhibits is attached hereto.

17. In the event that Pacific prevails on any of the counts in this proceeding, the parties will submit to the Court an agreed computation of the amount owing by the United States to Pacific, together with interest thereon.

Dated at Seattle, Washington, this 3rd day of September, 1957.

/s/ LAURANCE S. CARLSON,

/s/ DANIEL C. BLOM, of

RYAN, ASKREN &

MATHEWSON,

Attorneys for Plaintiff.

/s/ CHARLES P. MORIARTY,

A.A.B.

United States Attorney;

/s/ ALLEN A. BOWDEN,

Attorney, Dept. of Justice,

Attorneys for Defendants.

LIST OF EXHIBITS

Exhibit No. and Description of Exhibit

No. 1—Recapitulation of transportation taxes paid.

No. 2—Check No. 37601 dated September 25, 1950, drawn by Pacific Fruit & Produce Com-

pany on the National Bank of Commerce, Seattle, Wash., payable to the order of Chicago and North Western Railway Company in the sum of \$452.55, together with two freight bills paid by said check.

No. 3—Check No. 36610 dated September 8, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce, Seattle, Wash., payable to the order of Chicago, Burlington & Quincy Railroad Company in the sum of \$664.11, together with the freight bills paid by said check.

No. 4—Check No. 24676 dated July 13, 1950, drawn by Pacific Fruit & Produce Company on the Seattle-First National Bank of Seattle, Wash., to the order of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in the sum of \$532.85, together with freight bill paid by the said check.

No. 5—Check No. 38698 dated October 9, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce, Seattle, Wash., to the order of the Colorado and Southern Railway Company, in the sum of \$35.02, together with freight bill paid by the said check.

No. 6—Check No. 38983 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., to the order of Great

Northern Railway Company, in the sum of \$632.52, together with freight bill paid by the said check.

No. 7—Check No. 38988 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Northern Pacific Railway Company in the sum of \$202.59, together with two freight bills paid by said check.

No. 8—Check No. 38987 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Southern Pacific Company, in the sum of \$13.36, together with two freight bills paid by said check.

No. 9—Check No. 37621 dated September 25, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Spokane, Portland and Seattle Railway Company, in the sum of \$380.45, together with three freight bills paid by said check.

No. 10—Check No. 38984 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Union Pacific Railroad Company in the

sum of \$8.20, together with freight bill paid by said check.

No. 11—Office copy of Check No. 15712 dated July 24, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Illinois Central Railroad Company, in the sum of \$373.04, together with office copies of three freight bills paid by said check.

No. 12—Office copy of Check No. 06365 dated October 17, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Chicago, St. Paul, Minneapolis & Omaha Railway Co., in the sum of \$374.07, together with office copy of freight bill paid by said check.

No. 13—Office copy of Check No. 15708 dated July 24, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Chicago Great Western Railway Company, in the sum of \$173.42, together with office copy of freight bill paid by said check.

No. 14—Office copy of Check No. 01124 dated August 10, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Chicago, Rock Island & Pacific

Railroad Co., in the sum of \$786.93, together with office copy of freight bill paid by said check.

No. 15—Office copy of Check No. 15388 dated July 13, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., in the sum of \$623.90, together with office copy of freight bill paid by said check.

No. 16—Office copy of Check No. 15373 dated July 12, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Minneapolis & St. Louis Railway Co., in the sum of \$627.99, together with office copy of freight bill paid by said check.

A—Mimeograph letter (Mim. 5447, 1942-2 Cum. Bull. p. 280) dated December 7, 1942.

B—Treasury Department Press Release S-2100, dated Friday, September 2, 1949.

C—Letter ruling of Acting Commissioner of Internal Revenue, dated April 11, 1950.

D—Letter ruling of Deputy Commissioner of Internal Revenue, dated June 28, 1950.

E—Treasury Department Press Release S-2389, dated Friday, July 7, 1950.

[Endorsed]: Filed September 4, 1957.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 4291

PACIFIC GAMBLE ROBINSON CO., a Corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before Judge Bowen.

September 6, 1957

COURT'S ORAL OPINION

The Court: Respecting the weight of the Kellogg case (133 F. Supp. 387), the Court of Claims deciding that case is not a District Court of the United States such as this one. That court is a court set up by the Congress with a very specialized—a very important—jurisdiction under which that court specializes in the adjudication of claims by and against the Government of the United States. It has had vast experience in that field, which includes the interpretation of tax laws such as the one on which the claims in this action are based.

It is a very risky matter at best for this Court, in the absence of other controlling authority, to knowingly decline to follow the pertinent rulings of the Court of claims in a case involving a tax refund claim against the United States, especially

when such rulings are made by the Court of Claims in a tax refund case involving this very same tax statute (26 U.S.C.A. §3475(a)) and facts very similar to those in the case now before this Court.

Although one of the necessary 3-majority of the judges in the Kellogg case rested his concurrence with the majority ruling on the ground that the "payment" in Canada by checks on banks in the United States was a payment in the United States, the majority opinion sets out the Senate (legislative) Report on the Bill providing for statutory amendment that the Government's construction of the Statute on which was based the Government's exaction of the tax in that case was without the amendment the correct construction—in effect, that the tax was payable even if the transportation charges were in fact paid in Canada. With that Senate Report and construction this Court agrees for the reasons set out in the majority opinion in the Kellogg case.

In this case this Court feels impelled to apply the rule laid down in the Kellogg case by the Court of Claims, and also the construction of the statute approved by the Senate (legislative) Report set out in the majority opinion in that case.

Being so minded, it is the opinion, finding, conclusion and decision of the Court that the true and lawful meaning of this statute does not validate the escape of the taxpayer from liability for the tax here in question by this deviation on their part in

selecting a non-tax place for making payment of the freight charges on which were computed the taxes sought to be refunded by this litigation.

Therefore, the plaintiff should take nothing by its complaint in this action and the same should be dismissed with taxable costs in favor of the defendant.

[Endorsed]: Filed September 16, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court at Seattle, Washington, on September 6, 1957. Plaintiff appeared by Ryan, Askren & Mathewson, and was represented in court by Daniel C. Blom; and the defendant appeared by Charles P. Moriarty, United States Attorney for the Western District of Washington, and was represented in court by Allen A. Bowden, Attorney, Department of Justice, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service.

The Court, having considered the Stipulation of Facts, and evidence and exhibits introduced by the parties, and the arguments and briefs of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the

facts herein and states its conclusions of law as follows:

Findings of Fact

1. The plaintiff, Pacific Gamble Robinson Co. (hereinafter referred to as "Pacific"), was at all times mentioned herein and it now is a Delaware corporation, with its principal place of business in Seattle, King County, Washington. This Court has jurisdiction of the cause under the provisions of Title 28, United States Code, Sec. 1346(a)(1).

2. At all times mentioned herein, Pacific was engaged in the wholesaling of fresh fruits and vegetables and processed foodstuffs in the United States, as well as through subsidiaries in Canada. It conducted its business in the State of Washington and other western States under the trade name and style of "Pacific Fruit & Produce Co.," and in the mid-western part of the United States under the trade name and style of "Gamble-Robinson Company." The main offices of Pacific were maintained at Seattle, Washington, for operations conducted under the name of "Pacific Fruit & Produce Co." and at Minneapolis, Minnesota, for operations conducted under the name of "Gamble-Robinson Company." Branch offices of Pacific Fruit & Produce Company receiving transportation services hereinafter mentioned were maintained in various cities in Colorado, Idaho, part of Montana, part of Nebraska, Oregon, part of South Dakota, Washington, Wyoming and Utah. Branch offices of Gamble-Robinson Company receiving such services were maintained in

tiff's Exhibits 11 through 16 herein are photo-copies of office copies of checks together with the freight bills in payment of which they were issued. All other checks paid to each of the aforesaid railroad companies and the freight bills in payment of which they were issued were in substantially the same form as the examples pertaining to such railroad company. The said photo-copies are true copies which were received in evidence in lieu of all the originals, and are given the same force and probative effect as would be given all the original checks and freight bills pertaining to the payments hereinabove mentioned. (Retained office copies have been used where originals were not in existence.)

5. Checks and freight bills totaling \$812,810.10, together with the three per cent (3%) transportation tax thereon totaling \$25,164.28 were remitted to the offices of the respective railroad companies in Vancouver, B. C., Canada, in the following manner:

(a) Pacific's office in Seattle, Washington, upon receipt of the above-mentioned freight bills from time to time from the respective branches of Pacific Fruit & Produce Company, as set forth in plaintiff's Exhibit 1, drew checks upon Pacific's account in either the National Bank of Commerce or Seattle-First National Bank, both of Seattle, Washington, payable to the respective railroad companies in the amount of one or more freight bills, including the three per cent (3%) transportation tax thereon.

(b) The said checks, together with the freight bills pertaining thereto, were mailed to representatives of Pacific in care of Slade & Stewart, Ltd., 454 Prior Street, Vancouver, B. C., which was at all times mentioned in the complaint a subsidiary of Pacific. The said representatives of Pacific who resided in Vancouver, B. C., and the dates during which they so served follow:

Robert J. Wood, July 6, 1950, to August 27, 1950; William Richmond, August 28, 1950, to Oct. 20, 1950; F. J. Bates, October 31, 1950, to November 16, 1950.

(c) Upon the dates or during the periods stated after their names, the said representatives of Pacific delivered the said freight bills and checks during regular business hours to the duly authorized agents of the railroad companies concerned at their respective offices in Vancouver, B. C.

(d) The said agents of the railroad companies, on behalf of their respective principals, accepted the said checks in Vancouver, B. C., then and there marked the freight bills with an ink stamp, showing the word "Paid," or words to the same effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to the representatives. The said tax so collected was paid by each of the railroad companies concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. The said checks were in due course presented to the banks upon which they were drawn, and were hon-

ored by them. At all times after the said checks were issued, and until they were paid, there were sufficient funds in Pacific's account in the said banks to pay them.

(e) The salaries of the said representatives of Pacific were paid in part of Slade & Stewart, Ltd., by which they were also employed, and in part by Pacific. The aforesaid functions of the said representatives were the only functions performed by them for Pacific.

6. Checks and freight bills totaling \$1,620,321.98, together with the three per cent (3%) tax thereon totaling \$48,619.11, were remitted to the offices of the respective railroad companies in Winnipeg, Manitoba, Canada, in the following manner:

(a) Pacific's office in Minneapolis, Minnesota, upon receipt from time to time of the above-mentioned freight bills from the branch offices of Gamble-Robinson Company, drew checks upon its account in the Northwestern National Bank, Minneapolis, Minnesota, to the respective railroad companies, in the amount of one or more freight bills, including the three per cent (3%) transportation tax thereon.

(b) The said checks, together with the freight bills to which they pertained, were mailed to A. A. McGibbon, P.O. Box 697, Winnipeg, Manitoba, Canada, who resided in the said city. The said A. A. McGibbon was employed by Pacific for the sole purpose of paying the said freight bills.

(c) The said freight bills and checks were delivered by the said A. A. McGibbon during regular business hours to the duly authorized agents of the railroad companies concerned at their respective offices in Winnipeg, Manitoba.

(d) The said agents of the railroad companies, on behalf of their respective principals, accepted the said checks in Winnipeg, Manitoba, then and there marked the freight bills with an ink stamp, showing the word "Paid," or words to the same effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to the said A. A. McGibbon. The said tax so collected was paid by each of the railroad companies concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. The said checks were, in due course, presented to the bank upon which they were drawn, and were honored by it. At all times after the said checks were issued, and until they were paid, there were sufficient funds in Pacific's account in the said bank to pay them.

(e) The salary of the said A. A. McGibbon was paid by Pacific.

7. Checks and freight bills totaling \$171,880.39, together with the three per cent (3%) transportation tax thereon totaling \$5,153.78, were remitted to the offices of the respective railroad companies in Toronto, Ontario, Canada, in the following manner:

(a) Pacific's office in Minneapolis, Minnesota, upon receipt from time to time of the above-mentioned freight bills from the branch offices of Gamble-Robinson Company, drew checks upon its account in the Northwestern National Bank, Minneapolis, Minnesota, to the respective railroad companies, in the amount of one or more freight bills, including the three per cent (3%) transportation tax thereon.

(b) The said checks, together with the freight bills to which they pertained, were mailed to Peter McKercher, P.O. Box 313, Toronto, Ontario, Canada. The said Peter McKercher resided in Toronto, Ontario, and was an employee of Gamble-Robinson, Ltd., a subsidiary of Pacific with offices in Toronto, Ontario.

(c) The said freight bills and checks were delivered by the said Peter McKercher during regular business hours to the duly authorized agents of the railroad companies concerned at their respective offices in Toronto, Ontario.

(d) The said agents of the railroad companies, on behalf of their respective principals, accepted the said checks during regular business hours in Toronto, Ontario, then and there marked the freight bills with an ink stamp, showing the word "Paid," or words to the same effect, the date, and the location of the agent's office in Canada. The agents then returned the receipted bills to the said Peter McKercher. The said tax so collected was paid by each

of the railroad companies concerned to the Collector of Internal Revenue in the district in which it had its principal place of business. The said checks were, in due course, presented to the bank upon which they were drawn and were honored by it. At all times after the said checks were issued, and until they were paid, there were sufficient funds in Pacific's account in the said bank to pay them.

(e) The salary of the said Peter McKercher was paid by Gamble-Robinson, Ltd., and the aforesaid functions were performed by him in addition to other duties.

8. Pacific, within the time prescribed by law, to wit, on June 28, 1954, filed with each District Director of Internal Revenue for the Collection District in which any of the aforesaid railroad companies had its principal place of business, as shown in plaintiff's Exhibit 1, a separate claim on Treasury Department Form 843, for refund of the taxes paid by Pacific to such railroad company, asserting that the amounts paid by Pacific to such railroad company for transportation of property were not taxable under Section 3475 of the Internal Revenue Code of 1939, as amended, or at all, and were illegally collected, since such amounts were not paid within the United States. These claims were prepared and filed in the manner and form required by and in accordance with the provisions of Section 3313 of the Internal Revenue Code of 1939, as amended, and Regulation 113, Section 143.61. All of the said claims were denied in full by the Commissioner of Internal Revenue, through his designated agents, by notice of

disallowance by registered mail to Pacific, in accordance with the provisions of Section 3772(a)(2) of the Internal Revenue Code of 1939. All of the said notices were mailed Pacific on October 6, 1955, except the notice denying the claim for refund of taxes paid to the Union Pacific Railroad Company, which was so mailed on December 23, 1954, and that notice denying the claim for the refund of taxes paid to the Colorado and Southern Railway Company, which was so mailed on April 11, 1955.

9. On December 7, 1942, the Commissioner of Internal Revenue, Guy T. Helvering, issued a Mimeograph letter (Mim. 5447, 1942-2 Cum. Bull. p. 280), dated December 7, 1942, to the Collectors of Internal Revenue and others concerned. A photocopy of said Mimeograph letter is Defendant's Exhibit A-1.

10. On September 2, 1949, the Treasury Department of the United States issued Treasury Department Press Release S-2100, dated Friday, September 2, 1949. A photocopy of said Press Release S-2100 is Defendant's Exhibit A-2.

11. On April 11, 1950, the acting Commissioner of Internal Revenue, Fred S. Martin, issued a letter ruling MT:M:CTD, dated April 11, 1950, to the Northwest Fish Traffic Committee. A photocopy of said letter ruling MT:M:CTD is Defendant's Exhibit A-3.

12. On June 28, 1950, Deputy Commissioner of Internal Revenue, Charles J. Valaer, issued a letter

ruling dated June 28, 1950, to the National Industrial Traffic League. A photocopy of said letter ruling is Defendant's Exhibit A-4.

13. On July 7, 1950, the Treasury Department of the United States issued a Treasury Department Press Release S-2389, dated Friday, July 7, 1950. A photo-copy of said Press Release S-2389, dated Friday, July 7, 1950, is Defendant's Exhibit A-5.

14. No repayment of any of the taxes referred to hereinabove or any part of such taxes ever has been made to plaintiff by any of the railroad companies collecting the same, nor has Pacific otherwise recovered said taxes or any part thereof. Pacific has not consented to the allowance of credit or refund of such taxes, in whole or in part, to any of the said railroad companies.

15. Pacific is and always has been the sole and absolute owner of its aforesaid claims, and no transfer or assignment of said claims or any part thereof has ever been made. The copy of Transcript of "Court's Oral Opinion" herein filed this day is hereby referred to and made part hereof.

Conclusions of Law

I.

The Court has jurisdiction of the parties and subject matter of this action.

II.

The plaintiff was required by Section 3475(a) of the Internal Revenue Code of 1939 to pay trans-

portation taxes on shipments of property which were made entirely within the United States, and the opinion, findings and conclusions, and the decision of the Court announced September 6, 1957, herein, and the whole thereof, are hereby incorporated as a part of these findings and conclusions.

III.

The transportation taxes imposed by Section 3475(a) of the Internal Revenue Code of 1939 were legally imposed and collected from plaintiff, and judgment should be entered for the defendant, and for costs to be fixed by the Clerk.

Done in Open Court this 16th day of September, 1957.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ THOMAS R. WINTER.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1957.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

Civil Action No. 4291

PACIFIC GAMBLE-ROBINSON CO., a Corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This case came on for trial before the Court at Seattle, Washington, on September 6, 1957. Plaintiff appeared by Ryan, Askren & Mathewson, and was represented in court by Daniel C. Blom; and the defendant appeared by Charles P. Moriarty, United States Attorney for the Western District of Washington, and was represented in court by Allen A. Bowden, Attorney, Department of Justice, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service.

The Court, having considered the Stipulation of Facts, and evidence and exhibits introduced by the parties, and the arguments and briefs of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, and the Court having entered its Findings of Fact and Conclusions of Law herein, it is in conformity therewith

Ordered, Adjudged and Decreed that plaintiff take nothing from this action, and its complaint be dis-

missed with prejudice, and that judgment be entered for the defendant herein and for its costs hereby taxed in the sum of \$20.00.

Done in Open Court this 16th day of September, 1957.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ THOMAS R. WINTER.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Pacific Gamble-Robinson Co., a Delaware corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled cause in favor of the defendant the United States of America on September 16, 1957.

RYAN, ASKREN &
MATHEWSON,

/s/ LAURANCE S. CARLSON,

/s/ DANIEL C. BLOM,

Attorneys for Appellant.

[Endorsed]: Filed Nov. 8, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Pacific Gamble-Robinson Co., a Delaware corporation, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto the United States of America, the defendant herein, in the full and just sum of Two Hundred Fifty Dollars (\$250), to be paid to the said the United States of America, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Whereas, on September 16, 1957, in the above-entitled Court and cause, a judgment was rendered in favor of the defendant the United States of America and against the plaintiff Pacific Gamble-Robinson Co., and the said Pacific Gamble-Robinson Co. having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such that if the said Pacific Gamble-Robinson Co. shall prosecute said appeal to effect and shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said Pacific Gamble-Robinson Co. if the judgment is modified, then this

obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 5th day of November, 1957.

PACIFIC GAMBLE-ROBIN-
SON CO.,

By /s/ R. MILLER,

Its Executive Vice President,
Principal.

[Seal]

HARTFORD ACCIDENT &
INDEMNITY COMPANY,

By /s/ D. M. ADAMS,

Attorney-in-Fact, Surety.

[Endorsed]: Filed Nov. 8, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The points on which the appellant, Pacific Gamble-Robinson Co., intends to rely in connection with its appeal from the judgment entered in this action on September 16, 1957, are as follows:

1. Section 3475(a) of the Internal Revenue Code of 1939, as in effect prior to November 1, 1950, in plain and unambiguous language, imposed a tax only upon "the amount paid within the United States" for transportation from one point in the United

States to another. It was erroneous for the Court to construe the said statute as imposing the tax upon amounts paid without the United States by appellant upon such transportation, to wit, in Canada, and to conclude as a matter of law that the plaintiff was not entitled to a refund of the tax collected from it on amounts so paid by it.

2. The Court should have concluded as a matter of law that the aforesaid amounts paid for transportation by the plaintiff were not amounts "paid within the United States" within the purview of Section 3475(a) of the Internal Revenue Code of 1939, as amended.

3. The facts, as fully stipulated and as found by the Court, compelled a conclusion that the plaintiff was entitled to recover the tax collected from it in the amount of \$78,937.17, together with interest thereon as provided by law, and did not support the conclusion of the Court that the said tax was properly and lawfully collected.

RYAN, ASKREN &
MATHEWSON,

/s/ LAURANCE S. CARLSON,

/s/ DANIEL C. BLOM,

Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 4, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION
OF ORIGINAL EXHIBITS

This Matter having come on for hearing on the oral motion of the plaintiff-appellant; and the Court being fully advised:

It Is Hereby Ordered that all the original exhibits in the above-entitled cause be transmitted by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit, with the appellate record in said cause, so that the same may be considered by said Court in lieu of certified copies thereof.

Done in Open Court this 6th day of December, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

RYAN, ASKREN &
MATHEWSON,
Attorneys for Plaintiff-
Appellant.

Approved by:

/s/ THOMAS R. WINTER,
Attorneys for Defendant-
Respondent.

[Endorsed]: Filed Dec. 6, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP, and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the above-entitled action, including exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Dec. 17, 1956, with Exhibit "A" attached.

4. Answer, filed Feb. 15, 1957.

10. Stipulation of Facts, filed Sept. 4, 1957.

13. Court Reporter's Transcript of Court's Oral Opinion, filed 9-16-57.

15. Findings of Fact and Conclusions of Law, filed Sept. 16, 1957.

16. Judgment, filed Sept. 16, 1957, for Defendant.

18. Notice of Appeal, filed Nov. 8, 1957.

19. Bond for Costs on Appeal, filed 11-8-57.

20. Statement of Points on Which Appellant Intends to Rely, filed 12-4-57.

21. Designation of Contents of Record on Appeal, filed 12-4-57.

22. Order Directing Transmission of Original Exhibits, filed Dec. 6, 1957.

Plaintiff Exhibits numbered 1 to 19, inclusive, and

Defendant Exhibits numbered A-1 to A-5, inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for the appellant.

Witness my hand and official seal at Seattle this 9th day of December, 1957.

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EAGER,
Chief Deputy.

[Endorsed]: No. 15818. United States Court of Appeals for the Ninth Circuit. Pacific Gamble-Robinson Co., a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 11, 1957.

Docketed: December 18, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15818

PACIFIC GAMBLE-ROBINSON CO., a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant, Pacific Gamble-Robinson Co., hereby adopts by reference as the Statement of Points on Which Appellant Intends to Rely, the "Statement of Points on Which Appellant Intends to Rely" heretofore filed in the District Court of the United States for the Western District of Washington, Northern Division, and by the Clerk of said Court transmitted to this Court as Document 20 in the above-entitled cause.

RYAN, ASKREN &
MATHEWSON,

LAURANCE S. CARLSON,
DANIEL C. BLOM,

Attorneys for Appellant, Pacific Gamble-Robinson Co.

[Endorsed]: Filed Jan. 7, 1958.

No. 15818

United States Court of Appeals
For the Ninth Circuit

PACIFIC GAMBLE ROBINSON Co., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S BRIEF

RYAN, ASKREN, MATHEWSON, CARLSON & KING
LAURANCE S. CARLSON
DANIEL C. BLOM

Attorneys for Appellant.

545 Henry Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

FILED

JUN - 7 1958

United States Court of Appeals
For the Ninth Circuit

PACIFIC GAMBLE ROBINSON Co., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S BRIEF

RYAN, ASKREN, MATHEWSON, CARLSON & KING
LAURANCE S. CARLSON
DANIEL C. BLOM

Attorneys for Appellant.

545 Henry Building,
Seattle 1, Washington.

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United States Court of Appeals

For the Ninth Circuit

PACIFIC GAMBLE ROBINSON Co., a corporation,	<i>Appellant,</i>	} No. 15818
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

In this civil action, appellant, Pacific Gamble Robinson Co., a corporation (which will be referred to hereinafter as "Pacific"), sought to recover transportation taxes which it contends were illegally and erroneously collected from Pacific under Section 3475 of the Internal Revenue Code of 1939, as amended (Section 620(a) of the Revenue Act of 1942) (R. 4). The cause was tried in the District Court for the Western District of Washington, Northern Division, before the Honorable John C. Bowen, sitting without a jury (R. 50). The said District Court had jurisdiction of the cause under Title 28, U.S.C., Section 1346(a)(1) (R. 51). After trial, a judgment was entered in favor of the defend-

ant September 16, 1957 (R. 63). Appeal was taken on November 8, 1957 (R. 64) and filed in this court on December 11, 1957 (R. 71). This court has jurisdiction of the appeal under Title 28 U.S.C., Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Payment of Freight Bills Covering Transportation of Property Originating Between June 30, 1950, and October 31, 1950

Pacific was in 1950 and it now is a Delaware corporation engaged in the wholesaling of fresh fruits and vegetables and processed food stuffs in various states of the United States, as well as, through subsidiaries, in Canada. Its principal place of business was and is in Seattle, Washington (R. 51).

It maintained branches in various cities in Colorado, Idaho, Montana, Nebraska, Oregon, South Dakota, Utah, Washington and Wyoming (see first column of Exhibit A to the Complaint of plaintiff (R. 21-24; Exhibit 1), in which it did business under the name of "Pacific Fruit and Produce Company," with its main office for these operations in Seattle (R. 51). It had other branches in various cities in which it did business under the name of "Gamble-Robinson Company," with its main office for these operations in Minneapolis, Minnesota (R. 51-2). Pacific had a subsidiary corporation known as Slade & Stewart, Ltd., in Vancouver, B. C. (R. 55), and a subsidiary corporation known as Gamble-Robinson, Ltd., in Toronto (R. 58).

During the period of July through November of 1950,

Pacific received freight bills from various railroad companies with which it dealt (R. 52, and see Exhibit A to Complaint, R. 21-4, and Exhibit 1), for the rail transportation of food stuffs to and between its offices and branches within the United States. This transportation originated prior to November 1, 1950 (R. 52). Each of the railroad companies from which these bills were received maintained an office in Canada (R. 53) at which its agent was authorized to receive payment of the bills (R. 55, 57, 58). Some of these offices were in Vancouver, B. C. (R. 55), some in Winnipeg, Manitoba (R. 56), and some in Toronto, Ontario (R. 57). Pacific paid the above-mentioned freight bills at the Canadian offices of the railroad companies, in the manner described below, and was required to pay a tax thereon in the amount of 3%. This tax was collected by the railroad companies acting under the direction of the Commissioner of Internal Revenue (Ex. A-5) and under the authority of Section 3475 of the Internal Revenue Code of 1939 as amended (Section 620 (a) of the Revenue Act of 1942). The action was brought for the recovery of the tax so collected.

Payment of such freight bills incurred by Pacific, doing business as Pacific Fruit & Produce Company, was made in the following manner:

Upon receipt of freight bills from time to time from branches of Pacific Fruit & Produce Company, Pacific's Seattle office issued checks in payment of the charges and the 3% transportation tax thereon, drawn upon Pacific's accounts in one of two Seattle banks (Exhibits 2 through 11 are examples) and mailed these

checks, together with the freight bills which they paid to representatives in Vancouver, B. C., who were employed and paid jointly by Pacific and Slade & Stewart, Ltd. (R. 54-56). These representatives delivered the checks and freight bills, during regular office hours, to the duly authorized agents of the railroad companies concerned in Vancouver, B. C., who received the checks in payment of the freight bills, stamped the bills "paid" and returned the receipted bills to the representatives of Pacific (R. 55).

Payment of such freight bills incurred by Pacific, doing business as Gamble-Robinson Company, was made in the following manner:

The Minneapolis office of Pacific received freight bills from branches of Gamble-Robinson Company, and mailed them, together with checks covering the transportation charges and the 3% transportation tax thereon, drawn upon Pacific's account in a Minneapolis bank, either to A. A. McGibbon, Pacific's representative in Winnipeg (R. 56) or to Peter McKercher, an employee of Gamble-Robinson, Ltd., in Toronto (R. 58), depending upon whether the railroad companies concerned had offices in Winnipeg or Toronto. In each instance, the checks, together with the freight bills which they paid (Exhibits 12 through 16 are examples), were delivered by the said A. A. McGibbon or Peter McKercher to the duly-authorized agents of the railroad companies concerned during regular business hours, and were by these agents received in payment. The agents marked the bills "paid" and returned them

to the said A. A. McGibbon or Peter McKercher (R. 57-58).

The amounts thus paid by Pacific in all three Canadian cities for the transportation of property arising prior to November 1, 1950, were in the aggregate sum of \$2,605,012.47, and the tax collected thereon totalled \$78,937.17 (R. 53).

In each instance, the checks were in due course honored by the banks on which they were drawn, and the tax so collected from Pacific was paid by the railroad companies to the Collector of Internal Revenue in the district in which they had their principal places of business (R. 55, 57, 59; and see recapitulation of amounts paid to each railroad company in Exhibit A to Complaint (R. 21-4 and Exhibit 1)).

Transportation Tax Statute (IRC 3475)

By Section 3475 of the Internal Revenue Code of 1939 as amended,¹ Congress imposed a 3% excise tax effective December 1, 1942, *upon amounts paid within the United States* for transportation of property from one point in the United States to another, in the following language:

“(a) Tax — There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, * * *.”

¹ Added by Act of October 21, 1942, C. 619, Title VI, Section 620(a), 56 Stat. 979; 26 USCA 3475; Appendix A.

On December 7, 1942, the Treasury Department issued a Mimeograph Letter (Exhibit A-1, R. 60)² explaining section 3475, which stated, among other things:

“6. The tax does not apply to the amount paid for the transportation of property:

“ * * *

“(c) When paid outside the United States, regardless of where the transportation occurs; * * *.”

This construction was adhered to in letter ruling of the Treasury Department dated April 11, 1950 (Ex. A-3, R. 60) and Treasury Department letter dated June 28, 1950 (Ex. A-4, R. 60). And in a series of mimeographed rulings, the Commissioner of Internal Revenue, in defining the scope of Section 3475, referred uniformly and repeatedly to the tax as one imposed “upon amounts paid within the United States” (Ex. 17 through 19).³

On July 7, 1950, however, the Treasury Department Information Service issued Press Release S-2389 (Ex. A-5, R. 61) according to which the tax imposed by Section 3475 was purportedly extended by the Commissioner of Internal Revenue:

“ * * * to all shipments of property between two points in the United States * * * ”

regardless of the place of payment, because:

“ * * * the law does not excuse anyone from this tax if he pays his domestic freight bills outside the United States.”

² Mim. 5447, 1942-2, Cum. Bull., p. 280.

³ M.T. 15, 1943 Cum. Bull., p. 1158-9; M.T. 9, 1943 Cum. Bull., p. 1159-60; M.T. 13, 1943 Cum. Bull., p. 1161; M.T. 18, 1943 Cum. Bull., p. 1162; M.T. 26, 1948-1 Cum. Bull., p. 141; M.T. 35, 1949-1 Cum. Bull., p. 250.

On September 23, 1950, Congress enacted the Revenue Act of 1950, amending Section 3475(a) of the Internal Revenue Code of 1939 and, by this amendment, effective as to transportation originating on or after November 1, 1950, extended the tax imposed to amounts paid *without* the United States.⁴

On January 18, 1951, Part 143 of Regulations 113 was amended to reflect the extended scope of the newly-amended Section 3475(a).⁵

“Section 143.11. *Scope of tax.*

“Section 3475(a) imposes a tax upon (a) amounts paid within the United States after December 1, 1942, for transportation on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another, and (b) *amounts paid without the United States, on or after November 1, 1950, for transportation originating on or after such date*, of property by rail, motor vehicle, water, or air from one point in the United States to another. The tax applies only to amounts paid to a person engaged in the business

⁴ Act of September 23, 1950, C. 994, Title IV, Sec. 607(b), 64 Stat. 966:

“Sec. 607, TRANSPORTATION WHICH BEGINS AND ENDS WITHIN THE UNITED STATES.

“ * * *

“(b) Transportation of property — The first sentence of Section 3475(a) (relating to tax on transportation of property) is hereby amended to read as follows:

“‘There shall be imposed upon the amount paid *within or without* the United States for the transportation of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton.’” (Emphasis supplied)

⁵ T.D. 5826, January 18, 1951, 16 F.R. 456, 1951-1 Cum. Bull., p. 148, 149.

of transporting property for hire.” (Emphasis supplied)

Contrasting the application of the tax before and after the amendment, the Regulations continued:

“Section 143.13. *Application of tax.*

“ * * *

“(4) With respect to *amounts paid within the United States*, the tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

“*With respect to amounts paid without the United States, the tax applies to amounts paid on or after November 1, 1950, for transportation originating on or after that date.*” (Emphasis supplied)

Claims for Refund, Pleadings and Trial

On June 28, 1954, Pacific filed claims for refund of the transportation tax in the aggregate sum of \$78,-937.17, together with interest, imposed on it under the authority of IRC Sec. 3475 on amounts paid in Canada for transportation originating prior to November 1, 1950. These claims were filed with each District Director of Internal Revenue for the Collection District in which any of the railroad companies concerned had its principal place of business. In each of these claims, Pacific asserted that the tax was illegally collected, since the amounts paid by Pacific for transportation as aforesaid were not paid within the United States and were

not taxable under IRC Section 3475. The claims were denied by the Commissioner of Internal Revenue by registered mail between December 23, 1954, and October 6, 1955 (R. 59-60).

Thereafter, on December 17, 1956, Pacific commenced this action by filing its complaint herein (R. 3-24), in which it alleged that the aforesaid taxes were erroneously and illegally collected from it, since the amounts upon which the tax was imposed were paid in Canada, outside the purview of IRC Section 3475, and prayed for judgment in the total sum of \$78,937.17, with interest.

The material allegations of Pacific's complaint were denied by appellee in its answer, mainly on information and belief (R. 25-31).

All the facts material to the trial of the case were undisputed. They were set out in a Stipulation of Facts executed by Pacific and appellee, which was dated September 3, 1957, and duly filed (R. 31-43). The case went to trial on September 6, 1957 (R. 50), and was heard by the court on the Stipulation of Facts and Exhibits 1 to 16 and A-1 to A-5, inclusive, offered and admitted in evidence in accordance with the terms of the stipulation (R. 31), and exhibits 17 to 19, inclusive, which were also offered by appellant and admitted in evidence without objection (R. 70). No additional evidence was offered at the trial. At the conclusion of the trial, and after hearing the argument of counsel, the district court rendered an oral opinion in favor of the appellee (R. 48). In this opinion, the court ruled that even though the transportation charges were paid in Canada, the tax

was payable and properly collected under Sec. 3475(a) prior to its amendment in 1950 (R. 49). Thereafter, on September 16, 1957, Findings of Fact (R. 50), which incorporated largely the stipulated facts, Conclusions of Law (R. 61) and Judgment (R. 63) were entered, dismissing Pacific's complaint with prejudice.

Question Presented

The question before the court is this: May Section 3475(a) of the Internal Revenue Code of 1939, which prior to its amendment imposed a tax only upon amounts paid within the United States for transportation of property be extended by construction to impose the tax on amounts paid in Canada as well?

SPECIFICATION OF ERRORS

1. The court erred in its Conclusion of Law No. II (R. 61-2) that the plaintiff was required "to pay transportation taxes on shipments of property which were made entirely within the United States" without regard to the place where the payment for such transportation was made and in failing to conclude that said tax did not apply to payments made outside the United States.

2. The court erred in concluding as a matter of law that the transportation tax was payable even if the transportation charges upon which it was levied were in fact paid in Canada (R. 49).

3. The court erred in concluding as a matter of law that payment of freight charges in a "non-tax place" (R. 49-50) did not prevent the tax from attaching.

4. The court erred in concluding that the transportation taxes upon amounts paid in Canada were legally imposed and collected from appellant.

5. The court erred in refusing to grant judgment in the sum of \$78,937.17 together with interest thereon and costs to the plaintiff and in entering judgment for the defendant.

ARGUMENT OF THE CASE

Summary of Argument

The argument of appellant falls under two main headings.

Under Point I we contend that the district court should have given effect to the plain meaning of Sec. 3475 instead of enlarging it by construction to tax amounts paid without the United States. First we set forth a resume of the history of this section and its interpretation. Then we discuss the application of the rule that there is no room for construction of a statute when there is no ambiguity. This is followed by a discussion of the rule that taxing statutes are not to be extended by implication and a demonstration of the wisdom of that rule as applied to the facts of this case. We next illustrate that the judgment of the district court supplies an omission from the statute and that by doing so the court transcended the judicial function. We demonstrate, further, that the construction of the court rendered a portion of the statute, the words "within the United States," meaningless. Finally, we contend that not only was reference to the legislative history of a later amendment upon which the court based its deci-

sion inappropriate, but that the contemporary committee reports do not support the construction of the court and impliedly militate against it.

Under Point II we demonstrate that the payment by check in Canada could not have been, under the applicable rules of law, payment within the United States.

ARGUMENT

I.

The Lower Court Should Have Given Effect to the Plain and Unambiguous Meaning of "Paid Within the United States" Instead of Enlarging Its Meaning by Construction to Include Amounts Paid Without the United States

It has been pointed out above that Section 3475 of the Internal Revenue Code of 1939⁶ prescribed a 3% tax only upon the "amount paid within the United States" for transportation from one point in the United States to another.

For a period of approximately 71½ years after the effective date of this section (December 1, 1942), the Commissioner of Internal Revenue and his authorized representatives, in the official publications referred to above⁷ stated and reiterated, expressly or tacitly, that the tax did not apply to amounts paid outside the United States regardless of where the transportation occurred.

On July 7, 1950, however, prior to the amendment of IRC Sec. 3475, the Commissioner of Internal Revenue,

⁶Footnote (1), above.

⁷Mim. 5447, Par. 6(c), 1942-2 Cum. Bull. p. 280 at p. 281, Ex. A-1, Letter ruling dated April 11, 1950, Ex. A-3; Letter ruling dated June 28, 1950, Ex. A-4, and see footnote (3), above.

by press release purported to extend the original Section 3475 to apply to all transportation of property between two points in the United States, regardless of the place of payment of the charges.⁸

Not until the Revenue Act of 1950 was enacted was the tax imposed by Section 3475 actually extended by Congress so that it applied to amounts "paid within or without the United States"⁹ for transportation of property from one point in the United States to another.

In his Regulations promulgated after enactment of the Amendment, the Commissioner again acknowledged the obvious difference in scope between the original and the amended statute by pointing out that the original Sec. 3475 imposed a tax on amounts paid *within the United States* after December 1, 1942, but that:

"With respect to amounts paid without the United States, the tax applies to amounts paid on or after November 1, 1950, for transportation originating on or after that date."¹⁰

The payments involved in this case are those made by Pacific in Canada roughly from July through November, 1950, on transportation originating prior to November 1, 1950, the effective date of the amended statute (R. 53).

The meaning of the amended statute which extends the tax to payments without the United States is per-

⁸Treasury Dept. Press Release S-2389, Ex. A-5.

⁹Act of September 23, 1950, C. 994, Title IV, Sec. 607(b), 64 Stat. 966; set forth in its relevant part in footnote (4), above.

¹⁰T.D. 5826, January 18, 1951, 16 F.R. 456, 1951-1 Cum. Bull. p. 148, 149.

fectly transparent, and is not questioned by Pacific. What Pacific complains of is the arbitrary change by the Commissioner, sanctioned by the lower court, in the equally lucid meaning of the earlier section. As clearly as the amendment added payments without the United States, the original statute failed to include them.

Appellant feels that, in the interests of adding a minimal amount of revenue to the Treasury,¹¹ the Commissioner of Internal Revenue has been allowed to usurp the functions of Congress and change the plain meaning of a statute, and that, in sanctioning this change, the district court disregarded the most basic rules of statutory construction. It feels, further, that while the fiscal significance of the case is small, the principle that the plain language of a revenue statute may be ignored or changed arbitrarily, no matter how lofty the motives involved, threatens the life of the doctrine of equal justice under a uniform rule of law which is one of the great and unique strengths of our juridicial system. The attrition of this doctrine in the instant case may appear to serve the government; in the next it may operate against it. In the long run, it is inimical both to the government and the individual.

That IRC Sec. 3475 did not expressly impose the tax

¹¹ Only a period of approximately four months in 1950 was involved. We know of only two other suits filed in U. S. district courts for refund of this tax, of which both were filed and tried in the Ninth Circuit and are pending on appeal before this court. Only two cases have been filed in the Court of Claims to our knowledge, of which only one, *Kellogg Company v. U. S.*, 132 Ct. of Claims 507, 133 F.Supp. 387 (1955), has been tried. The applicable statute of limitation of four years on filing of claims for refund (Sec. 3313, IRC of 1939) and of two years on commencement of actions after rejection of claims for refund (Sec. 3772(a)(1), IRC of 1939) would apparently have barred practically all other possible claims.

with which it deals upon the payments made by Pacific in Canada during the four-month period in question is patent.

As we understand the position of the government below, and the decision of the district court, no contention is made that the language of the statute is ambiguous or uncertain. . . .

The district court, in its oral opinion, tacitly recognized that the statute did not in terms impose the tax on payments in Canada when it found that Pacific, in what the court called a "deviation," paid its transportation charges in a "non-tax place" (R. 50), to-wit, Canada.

Rather, the court accepted the contention of the government that the case of *Kellogg Company v. United States*, 132 Ct. Cl. 507, 133 F.Supp. 387 (1955), in which the Court of Claims had decided a somewhat similar case adversely to the taxpayer, should be followed. The court said:

"It is a very risky matter at best for this court in the absence of other controlling authority, to knowingly decline to follow the pertinent rulings of the Court of Claims in a case involving a tax refund claim against the United States . . ." (R. 48)

And, following the lead of the *Kellogg* case, the district court held that the "construction" of IRC Sec. 3475 made by the Commissioner of Internal Revenue and approved by a Senate committee reporting upon the later Revenue Act of 1950, ". . . in effect, that the tax was payable even if the transportation charges were in fact paid in Canada" was a correct one (R. 49).

We will discuss the reasoning in the *Kellogg* case, the validity of the "construction" by the Commissioner of Internal Revenue, and the nature of the legislative history upon which reliance is placed in some detail below. But we should like first to point out why, in our opinion, the district court should have declined to consider these proffered aids to "construction."

There Is No Room for Construction of a Statute When There Is No Ambiguity

The cardinal prerequisite of statutory construction is that there be some ambiguity or uncertainty in a statute which requires interpretation. As the Supreme Court said in *Hamilton v. Rathbone*, 175 U.S. 414, 421, 44 L.ed. 219, 20 S.Ct. 155 (1899):

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly in the domain of ambiguity, that an extended review of them is quite unnecessary."

When the language is plain and admits of only one meaning, the task of interpretation does not arise. In the words of the court in *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253, 73 L.ed. 311, 49 S.Ct. 112 (1929):

"The words being clear, they are decisive. There is nothing to construe."

And see *Henderson v. Rogan* (9 Cir.) 159 F.(2d) 855, 859 (1947). The primary source of the intention of congress is the language of the statute, and "... where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

Thompson v. U. S., 246 U.S. 547, 551, 62 L.ed. 876, 38 S.Ct. 347 (1918).

For, as Mr. Justice Frankfurter wrote:

“ . . . the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense.”

Addison v. Holly Hill Fruit Products, Inc.,
322 U.S. 607, 617, 88 L.ed. 1488, 64 S.Ct. 1215 (1944).

We submit that there is nothing ambiguous or uncertain in the language “paid within the United States,” as used in IRC Sec. 3475. Its meaning is obvious. There is nothing in the statute to indicate that Congress intended that this plain, uncomplicated language be interpreted in any unusual manner. The court had nothing to construe under the cases cited above, and should have given to the statute its plain and natural meaning.

Taxing Statutes May Not Be Extended by Implication

Obvious though it may be that there is no evidence of the express intent of Congress that the tax apply to payments without the United States as well as within, could a court properly search for or postulate an *implied* intent of Congress? The Court of Claims thought so in the *Kellogg* case, and implied an intent that the tax not be avoided by the payment of charges across the border in Canada, when payment of the same charges on this side of the border would have resulted in taxation.

The search for an implied intent in the absence of

any ambiguity or uncertainty in the meaning of the words employed by Congress contravenes an established rule of statutory construction: that taxing statutes cannot be extended by mere implication. The rule was thus stated in *Gould v. Gould*, 245 U. S. 151, 153, 62 L.ed. 211, 38 S.Ct. 53 (1915):

“In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.”

In *Smietanka v. First Trust & Savings Bank*, 257 U.S. 602, 605-6, 66 L.ed. 391, 42 S.Ct. 223 (1922), it was argued by the Government that a surtax upon net incomes of all individuals should be applied to the income of a trust accumulated for unborn beneficiaries because a general intention of Congress to tax all incomes should be implied. The court held unanimously against the Government. Speaking through Mr. Chief Justice Taft, it said:

“It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication.”

Courts generally have wisely declined to be drawn into the treacherous quagmire of the search for legisla-

tive intent contrary to the plain language of a statute. The enactment of laws lies in the domain of politics. Their enactment is influenced by the fundamental political and economic attitudes and prejudices of the legislators and their constituents. The proper scope of a tax law, the proper subjects of taxation, equality and inequality in taxation, are sharply-debated questions to which the logic of the law alone usually can produce no answers.

Barring constitutional considerations, what Congress should or should not do or have done is a political or legislative question, and the proper responses thereto are legislative. Thus, if, as the Government contends, payments outside the United States should not have been excluded from IRC Sec. 3475, the appropriate response to the exclusion was the enactment of Section 607(b), of the Revenue Act of 1950. This was a matter for Congress itself. The proper inquiry of the court is limited to what Congress actually *meant* or *did* by a statute. And that is to be gathered from the statute, when it is unambiguous.

Excise taxation is historically and traditionally selective. Some commodities and transactions are taxed and others are not. Practically any excise tax statute presents serious problems in terms of pure logic. Many people may be unable to see any reason why Congress should have taxed one commodity or activity and have failed to tax another. Yet, arbitrary inclusions and exclusions based upon a variety of political and economic considerations have always existed and exist today. Conditioned by the prejudice of a particular economic,

political or social viewpoint, an individual may be utterly incapable of agreeing with the distinctions of such a law. But the argument that no one could believe that Congress intended what to the individual concerned is an inequity or even an absurdity is of no avail against the plain letter of the law.

IRC Sec. 3475 is illustrative of the customary selectivity of excise taxation. This excise tax statute does not purport to be exhaustive of all the subjects of possible taxation of property transportation within the U. S. In addition to the limitation of the tax on transportation within the United States to amounts paid within the United States, IRC Sec. 3475 makes other selections and limitations: For, example, when transportation takes place from a point outside the United States to a point within the United States, the part of such transportation which takes place within the U. S. is taxed *only when it is paid for within the United States*.

Pursuing the implied intent of Congress the Court of Claims in the *Kellogg* case,¹² with reference to payment in Canada of domestic transportation charges, said that Congress could not have intended to permit the "absurd result of inviting the escape from all such taxes by the simple device of carrying a check across the border and delivering it to an agent of the transportation company."

It can be argued with equal justification that Congress could not have intended to permit the escape from

¹² *Kellogg Company v. United States*, 132 Ct. Cl. 507, 132 F.Supp. 387 (1955).

all taxes on the domestic portion of transportation originating in Canada by the simple expedient of payment outside the United States. Yet Congress did not subject such payments to the tax.

Can there be any doubt that the language of Congress as well as its selected subjects of taxation, was carefully and deliberately chosen? To hold otherwise is to overlook the characteristics of modern revenue laws and their enactment. Tax statutes are written with consummate care. The authors of these statutes strain to make their language exact and precise and state the scope of the operative clauses completely and exhaustively. Months of study, discussion and debate are devoted to them.

If the Congress had intended to apply the tax to all domestic property transportation, regardless of where payment was made, it would have been as simple a matter to add the phrase "or without" in 1942 as it was in 1950, when the amendment supplied these words. It would have been equally simple to omit the qualification "within the United States," altogether as did the World War I prototype for Section 3475, Section 500 of the Revenue Act of 1917.¹³ But Congress used neither of these obvious indications of intention and gave no sign whatever that it intended the tax to apply except to "amounts paid within the United States." We be-

¹³ Act of October 3, 1917, C. 63, Title V, Sec. 500, 40 Stat. 314 provided: "That from and after the first day of November nineteen hundred and seventeen, there shall be levied, assessed, collected and paid (a) a tax equivalent to three per centum *of the amount paid* for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of freight consigned from one point in the United States to another * * *" (Emphasis added).

lieve that the words of the Supreme Court in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618, 88 L.ed. 1488, 64 S.Ct. 1215 (1944), are particularly appropriate here:

“The idea which is now sought to be read into the grant by Congress . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least suggest it . . . ”

It is reasonable to conclude that if Congress had intended the result sought by appellee it would have said so.

Once the view is taken that the manifest intent of Congress as evidenced by the statutes which it writes may be ignored in the pursuit of an assumed intent of the Congress, the opportunities for error and confusion are almost unlimited. Thus, the Court of Claims, searching for reasons in support of an apparent conviction that Congress could not have intended to exempt the shipper who paid for transportation across the border, declared that when IRC Sec. 3475 was enacted, “Canada had a law which taxed transportation in that country, similarly”¹⁴ and that Congress wanted to place a corresponding tax on similar transportation in this country. “Congress, manifestly, instead of granting any exemption intended to close the gap and tax all transportation between points wholly within the United States. Evidently no thought was given to the possibility of a repeal of the Canadian tax and consequently no thought was given to the single phrase which plain-

¹⁴ 132 Ct. Cl. 507, 512-3, 133 F.Supp. 387, 390 (1955).

tiff has undertaken to lift out of its context and construe as if it were the whole law.”

On close analysis, this argument becomes logically self-defeating. For it assumes the point which it attempts to refute—that Congress did not, in 1942, intend to apply the tax to payments in Canada. The argument tacitly admits that Congress did not, then, intend to make the tax applicable to payments outside the United States, when it attempts to explain that, since Canada had a similar tax, it was not necessary to make the tax apply to payments outside the United States, and the later necessity of such a provision did not occur to Congress. That this necessity was *later* perceived because of a change in circumstances, the repeal of the Canadian tax, does not support the proposition that the statute should be so “construed” as of the time of enactment as to provide in advance for the consequences of this change. *Addison v. Holly Hill Fruit Products, supra*, 322 U.S. 607, 617-18, 88 L.ed. 1488, 64 S.Ct. 1215 (1944), and see discussion under heading “The Supplying of Omissions Transcends the Judicial Function,” *infra*, page 24.

Another flaw in this argument is that it assumes that Congress could only have been concerned with the exclusion of payments in Canada when it used the language “amount paid within the United States.” Actually, this phrase excludes payments throughout the world, and there is nothing to indicate that Congress considered the situation in Canada to be of unique importance.

But the most glaring flaw in the argument is that it

is based upon mistaken facts. Contrary to the assumption of the Court of Claims, that Canada had a similar tax, the fact is that, while Canada had a tax on transportation of *persons* which was repealed in 1949 *it had no tax on transportation of property during the war or after*.¹⁵ Consequently, the chief explanation of the Court of Claims of the assumed intent of Congress falls to the ground by reason of a mistaken premise! There would be more justification for the argument that Congress, realizing in 1942 that Canada had no similar tax on the transportation of property, wanted to eliminate the competitive advantage of Canadian railroad companies by allowing tax-free payment in Canada of charges incurred for transportation within the United States. This argument at least would be based on correct factual premises. But the intrinsic merit of the argument is not at issue. We suggest it merely to illustrate that debate as to the motives of Congress is fruitless, unnecessary and confusing when Congress has made its meaning clear in the language which it has employed.

The Supplying of Omissions in a Statute Transcends the Judicial Function

The above-cited decisions declining to search for an

¹⁵ See Chapter 179, Revised Statutes of Canada, 1927, as amended by Section 4, Chapter 54, Statutes of 1932; Section 6, Chapter 27, Statutes of 1940-41; Section 13, Chapter 32, Statutes of 1942; Section 4, Chapter 60, Statutes of 1947, all of which impose or modify a tax on transportation of persons but impose none on transportation of property. See also Chapter 21, Statutes of 1949, repealing tax on transportation of persons and Report by Committee on Finance, U. S. Senate, on Revenue Act of 1950, referring to repeal of Canadian tax on transportation of persons, 1950-2 Cum. Bull., p. 483, 502.

“implied intent” of Congress¹⁶ are grounded upon the realization that, in actuality, the court was being asked to abandon the traditional limits of the judicial function and allow itself to be drawn into the arena of social, economic and political judgments. It is axiomatic that the role of the legislature is to make the laws and that of the courts is to interpret them. In these cases, the court was being asked in effect to make laws by supplying omissions in them. The effect of the decision of the district court in the instant case was to supply an omission by Congress of payments in Canada from the tax. But, the plain language of the statute failed to provide any support for the contention that the omission was not desired by Congress. And assuming *arguendo* only that there were strong extrinsic reasons for believing that the omission was not deliberate, established rules of judicial self-restraint made its supplying improper. In *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617-618, 88 L.ed. 1488, 64 S.Ct. 1215 (1944), the court called attention to the fact that after-regretted omissions from legislation were inherent in the legislative process:

“Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. ‘The natural meaning of words cannot be displaced by reference to difficulties in administration.’ * * * ”

¹⁶ *Gould v. Gould*, 245 U.S. 151, 153, 62 L.ed. 211, 38 S.Ct. 53 (1915); *Smietanka v. First Trust & Savings Bank*, 257 U.S. 602, 607, 66 L.ed. 391, 425. Ct. 223 (1922) p. 13. above.

In *Iselin v. United States*, 270 U.S. 245, 250, 70 L.ed. 566, 46 S.Ct. 248 (1926), a taxpayer sought a refund of tax imposed by the government upon the sum received by her when she leased her box at the Metropolitan Opera House for the season. The Act under which the government assessed the tax imposed a tax on sales of tickets for amounts in excess of the established price. There was no established price for such boxes, and the statute did not, accordingly, expressly cover such a transaction. The government argued that Congress intended to tax all sales of tickets and gave no indication of an intent to exempt any sales. The Supreme Court held that the plaintiff was entitled to recover the tax. Mr. Justice Brandeis said:

“It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the Act contains no provision referring to tickets of the character here involved; and there is no general provision in the Act under which classes of tickets not enumerated are subjected to a tax . . . Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function * * **”
(Emphasis supplied)

Construction of Lower Court Violated Rule Against Constructions Rendering Part of a Statute Meaningless

For the reasons outlined above, appellant believes that the court should not have attempted to change by construction the plain words of Sec. 3475, which warranted no such construction.

But assuming *arguendo* that the court was justified in seeking to construe the statute, we believe that the court's construction was an improper one.

We have heretofore argued that this was a selective excise tax statute and that Congress, having omitted other categories of transportation, failed to evince any sweeping intent to tax any categories not included; that the effect of the court's decision was to read into the words "paid within the United States" the antithetical proposition "paid without the United States."

But the court's construction is further objectionable in that it renders a part of the statute meaningless.

If the tax applied whether the amounts were paid within or without the United States, the words "within the United States" were superfluous. Congress need not have included them—it could simply have referred, as did the 1917 Revenue Act,¹⁷ to "amount paid."

It is an elementary rule, however, that the words of a statute shall be construed in such a way that every word is given effect.

That rule was stated in *Application of Rogers* (9 Cir.) 229 F.(2d) 754, 757 (1956), in which this court cited with approval the leading case of *Market Company v. Hoffman*, 101 U.S. 112, 116, 256 L.ed. 782 (1879). There the Supreme Court held:

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment,

¹⁷ See footnote (13), *supra*.

Sec. 2, it was said that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.’ ”

The same rule was stated in the following cases :

McDonald v. Thompson, 305 U.S. 263, 266; 83 L.ed. 164, 59 S.Ct. 176, reh. den. 305 U.S. 676, 83 L.ed. 437, 59 S.Ct. 536 (1938) ;

U. S. v. Menasche, 348 U.S. 528, 538-9, 99 L.ed. 615, 75 S.Ct. 513 (1954).

The lower court’s construction disregarded this important rule.

Resort to “Legislative History” Was Improper and Inconclusive

The construction of the district court was further erroneous in its reliance upon and interpretation of “legislative history.” As did the Court of Claims in the *Kellogg* case, the district court sought the intent of Congress in the report of the Senate Finance Committee upon the Revenue Act of 1950.

At the outset, it should be reiterated that the rule is well established that when there is no ambiguity in a statute, the statements of Congressional committees about the statute are irrelevant. Thus, in *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89, 80 L.ed. 62, 56 S.Ct. 70 (1935), the court held that :

“We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports when there can be no doubt of the meaning of the words used.”

This court has stated the same rule in *Jeu Jo Wan v. Nagle* (9 Cir.) 9 F.(2d) 309, 310 (1925):

“The terms of the act are free from ambiguity and in such cases the courts are not at liberty to resort to or examine the proceedings in Congress.”

But, again assuming *arguendo* that reference to committee reports was proper, we wish now to examine the “legislative history” which was relied upon by the Government in the trial of the case at bar, and invoked by both the Court of Claims in the *Kellogg* case and the district court in the case at bar.

The “legislative history” mentioned above was not the report of any committee of the 77th Congress which enacted Sec. 3475 in 1942. Rather, it was a report of the Senate Finance Committee of the 81st Congress which, in 1950, enacted Section 607(b) of the Revenue Act of 1950, amending Section 3475 so that it applied to amounts paid without as well as within the United States.¹⁸

The Senate report was preceded by the Report of the Ways and Means Committee of the House of Representatives, where the Revenue Act of 1950 originated. This report contained no suggestion that Section 3475, as enacted in 1942, was ever intended to be broader in scope than its language indicates. In fact, the reported House Bill reduced the tax on transportation from 3 per cent to 1½ per cent, and the committee stated:

“The tax on transportation of property is a cost of doing business to practically every producer shipping his products to market. Moreover, it is a particularly discriminatory tax, since larger taxes

¹⁸ See footnote (4), *supra*.

must be paid by those shipping greater distances. Thus, this tax particularly discriminates against producers in the South and Far West."¹⁹

While the Senate Finance Committee report on which reliance was placed by the Government below states that the press releases of the Commissioner of Internal Revenue are correct interpretations of the law as to payments made outside the United States,²⁰ it refers to the "existence of considerable dispute as to the correctness of these interpretations of law by the Commissioner." Its conclusions have the character of an expression of an opinion on a judicial question, rather than a statement as to the intent of an earlier session of Congress. Nothing is stated to support these conclusions except a quotation from the Commissioner's press release of July 7, 1950.²¹ It is reasonable to conclude that this Committee of the 81st Congress had no real indication of the intent of the 77th Congress. Accordingly, the Senate Finance Committee of the 81st Congress was in a position where, like the Court of Claims, the appellee and the district court, it was speculating about the intent of an earlier Congress upon a question when there was no evidence of such intent except for the language employed by that Congress. There is no doubt that the statements of this committee as to the intent of the *81st Congress* with reference to legislation enacted by it would be entitled to great weight. But under the circumstances of the case at bar,

¹⁹ House of Representatives Report No. 2319, 81st Congress, 2nd Session, Committee on Ways and Means, 1950-2 Cum. Bull. p. 380, 390.

²⁰ Senate Report No. 2375, 81st Congress, 2d Session, Com. on Finance, 1950-2 Cum. Bull. p. 483.

²¹ *Ibid*, p. 502.

they are no more entitled to decisive weight upon the question before this court than are the rulings of the Commissioner of Internal Revenue which they endorse.

The final committee report upon the Revenue Act of 1950, that of the Conference Committee,²² contains no support for the proposition that in amending Section 3475 Congress simply declared existing law. Instead, in reference to Section 607(b) the report states that “. . . *it imposes the tax on amounts paid without the United States* for the transportation of property from one point in the United States to another”²³ (emphasis supplied).

An examination of *contemporary* committee reports, those of the 77th Congress, which are far more significant as indications of Congressional intent than those of a later Congress, discloses that they are devoid of any indication that the scope of Section 3475 was intended to radiate beyond its language.

Thus, the Committee on Ways and Means of the House of Representatives, reporting on the Revenue Bill of 1942, which provided for a tax on transportation of property in the amount of 5%, simply stated that:

“This bill imposes a new tax . . . upon the amount paid within the United States for the transportation of property . . . from one point in the United States to another . . .”²⁴

²² House of Representatives Report No. 3124, 81st Congress, 2d Session, 1950-2 Cum. Bull., p. 580.

²³ *Ibid*, p. 593.

²⁴ House of Representatives Report No. 2333, 77th Congress, 1st Session, 1942-2 Cum. Bull., p. 372, 406.

There is no elaboration upon the scope of the tax either in the report of the Senate Finance Committee, which had eliminated the tax on transportation of property altogether on the ground that it contributed to inflation,²⁵ or in the report of the Conference Committee, which reinstated the tax at 3%.²⁶

Indeed, a close examination of the contemporary legislative history of Section 3475, to the contrary of affording support for the construction made by the lower court, would lend support to the contention that the omission from the tax of payments outside the United States was considered and deliberate rather than inadvertent. For the above-mentioned report of the Ways and Means Committee of the House²⁷ takes cognizance of the fact that: "During the World War a tax was imposed upon transportation of property by freight at a rate of 3% and upon transportation of property by express at a rate of 5%." That this statute was before the House when the Revenue Act of 1942 was drafted is not only clear from the above reference to it, but from an examination of the statute itself. Thus, the Revenue Act of 1917²⁸ provides as follows:

"Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of *the amount paid* for the transportation by rail or water or by

²⁵ Senate Report No. 1631, 77th Congress, 2d Session, 1942-2 Cum. Bull., p. 504, 553.

²⁶ House of Representatives Report No. 2586, 77th Congress, 2d Session, 1942-2 Cum. Bull., p. 701, 732.

²⁷ See footnote (24), *supra*.

²⁸ Act of October 3, 1917, C. 63, Title V, Sec. 500, 40 Stat. 314.

any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another; * * * ”(Emphasis added)

If this provision is compared with Section 3475 it will be seen that they are fundamentally similar. Both statutes impose the tax on “the amount paid.” But, whereas the earlier provision imposes the tax upon “the amount paid” without qualification as to place of payment, Section 3475 inserts after “the amount paid” the qualification “within the United States.” Is it not reasonable to assume that this qualification in the later statute was deliberate and not accidental? Certainly there would seem a sounder basis for that assumption than that in using the words “within the United States” Congress intended the tax to apply regardless of place of payment.

Thus, we reiterate not only that examination of the legislative history of IRC Section 3475 is unnecessary and improper, in the light of the clarity of that provision, but that contemporary committee reports tend to militate against the appellee’s contention that IRC Section 3475 should be extended by construction, and tend to support the position of appellant that the statute, neither in fact nor intent, expressly or impliedly, extends to amounts paid without the United States.

II.

The Amounts Paid by Pacific for Transportation Were Not Amounts “Paid Within the United States”

As indicated above, Pacific made the payments in

question with checks delivered by representatives in Canada to the authorized agents of American railroad companies there. These checks were received in payment by the agents and the freight bills were marked "paid" and returned to Pacific's representatives.

No serious contention was made below that this mode of payment did not constitute payment in Canada, and the court correctly found that payment was made by Pacific in a "non-tax place" (R.50).

Our discussion of this point is, however, prompted by a suggestion in the majority opinion in the case of *Kellogg Company v. U.S.*, 132 Ct. Cl. 507, 133 F.Supp. 387 (1955) that where payment was made by check drawn on a United States bank, there was "serious doubt as to whether payment was actually made in Canada." This view was based upon a "technical construction" which focused attention upon the final payment of the check *by the drawee* bank as a significant act rather than its delivery and acceptance as payment. While the majority opinion was grounded upon the theory that the "implied intent" of Congress was to subject all transportation within the United States to the tax regardless of place of payment, the narrow majority of three to two was secured by the concurrence of one judge "on the ground that payment was made within the United States." The two dissenting judges held "that the physical delivery of the cashiers' checks was clearly payment without the United States within the meaning of Section 3475(a) of the Internal Revenue Code."

We believe that the view that payment by check de-

livered outside the United States is payment “within the United States” is untenable. It does violence not only to common and commercial usage, but to established rules of statutory construction.

The argument that “paid” should be construed as limited to the final payment by the drawee bank is untenable for the following reasons:

- (1) *It ignores the common and ordinary meaning of “paid,” which includes the giving and receipt of a check*

To pay, in ordinary and common usage, includes to give a check in payment of a purchase or obligation. So common is the use of checks for the payment of obligations today, that the whole business community, indeed the whole population of this country, would be shocked by the notion that the giving and receipt of a check did not constitute payment.

The universality of this usage is indicated by the definition of “pay” in Webster’s New International Dictionary, 2d Ed. Unabridged, as including:

“To give a recompense; to make payment, requital or satisfaction; to discharge a debt; as he *pays* in full, by *check* or on time.” (Last emphasis supplied)

The common meaning of payment as embracing the giving and receipt of a check is indicated by the U.S. Court of Appeals for the 8th Circuit in construing the word “paid” as used in IRC Section 24(c):

“Furthermore, as a matter of common parlance, we think it is most common to speak of ‘paying’ an

obligation by giving one's check for it. This is the common method of paying bills in this country."

Miller v. Commissioner (8 Cir.) 164 F.(2d) 268, 269 (1947).

The rule is well established that, in the construction of revenue acts, as well as in the construction of other legislation, the natural, ordinary and familiar meanings of words are to be used, in the absence of a specific intent that some special meaning be applied.

In *Helvering v. Flaccus Leather Co.*, 313 U.S. 247, 249, 85 L.ed. 1310, 61 S.Ct. 874 (1941), the Government contended that a sum received in settlement of a fire loss from an insurance company should be regarded as derived from a "sale or exchange of property" within the meaning of Section 117(d) of the Revenue Act of 1924. The court, in holding against the Government, said:

"Generally speaking, the language of the Revenue Act, just as in any statute, is to be given its ordinary meaning, . . ."

The taxpayer is entitled to have the language of a statute construed in its ordinary and obvious sense, and has been protected by the courts against a devious and strained construction promulgated for the sole purpose of subjecting him to a tax which otherwise does not apply to him. Thus, in *Lynch v. Alworth-Stephens Company*, 267 U.S. 364, 370, 69 L.ed. 660, 45 S.Ct. 274 (1925), the court held that the "plain, rational and obvious meaning" is to be sought by courts, and that it is "always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case

and the ingenuity and study of an acute and powerful intellect would discover.”

These principles were applied in the case of *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 559-61, 76 L.ed. 484, 52 S.Ct. 211 (1932), which we believe is illuminating. There, the court had before it a question of construction of the Revenue Act of 1921. The provision in question specified that, in the computation of net income of a corporation “all interest paid or accrued within the taxable year on its indebtedness” was deductible from gross income. The taxpayer had deducted all interest paid on outstanding bonds. The Government contended that where the bonds were sold at a premium, the premium received by the company had the effect of reducing the real interest paid on the bonds, and that deductible interest should accordingly, be reduced by an amortized portion of the premium. It contended that otherwise the corporation could establish a high rate of interest on the bonds, sell them at a higher premium and thereby secure the full benefit of the interest reduction and avoid taxation on the premium. The Supreme Court held against the Government. Speaking for a unanimous court, Mr. Justice Roberts said:

“In other words the contention is that by the use of the quoted phrase the statute did not intend to allow the deduction of the amount agreed to be paid, which the contract denominated ‘interest,’ but of a different sum to be ascertained by a calculation which will allocate the payment between a partial and ratable return of the premium and ‘effective’ interest on the part of the security.

“Is this the reasonable construction of the language of the act,—‘all interest . . . on its indebtedness’? The rule which should be applied is established by many decisions. ‘The legislature must be presumed to use words in their known and ordinary signification.’ *Levy’s Lessee v. McCartee*, 6 Pct. 102, 110. ‘The popular or received import of words furnishes the general rule for the interpretation of public laws.’ * * * As was said in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, ‘the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.’ This rule is applied to taxing acts: *DeGanay v. Lederer*, 250 U.S. 376, 381.

“Applying the accepted tests to the language of the statute, we are of the opinion that the construction contended for by the Commissioner is inadmissible. In common parlance the bonded indebtedness of a corporation imports the total face of its outstanding bonds,—the amount which must be paid at their maturity. The phrase is not generally used to connote par plus an unreturned proportion of premium.

“And as respects ‘interest,’ the usual import of the term is the amount which one has contracted to pay for the use of borrowed money. He who pays and he who receives payment of the stipulated amount conceives that the whole is interest. In the ordinary affairs of life no one stops for refined analysis of the nature of a premium or considers that the periodic payment universally called ‘interest’ is in part something wholly distinct—that is, a return of borrowed capital. It has remained

for the theory of accounting to point out this refinement. We cannot believe that Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term, or that it was acquainted with the accountants' phrase 'effective rate' of interest and intended that as the measure of the permitted deduction * * *

"In short, we think that in the common understanding 'interest' means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon, and that the words of the statute permit the deduction of that sum, and do not refer to some esoteric concept derived from subtle and theoretic analysis.

"If there were doubt as to the connotation of the terms, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer.* * * " (Emphasis supplied)

- (2) *It ignores the usage among shippers and railroad companies, sanctioned and confirmed by the Interstate Commerce Commission and the courts, that the delivery and receipt of a check constitute payment of a freight bill***

The giving of checks in Canada was regarded and accepted both by the plaintiff and the railroad companies concerned as payment. Evidence was the fact that the freight bills were marked "paid" upon delivery of the checks. That understanding reflected a usage which was not only common and general among shippers and carriers, but was expressly recognized and

sanctioned by the Interstate Commerce Commission and the courts.

Part 1, Section 3(2) of the Interstate Commerce Act²⁹ provides:

“No carrier by railroad and no express company subject to the provisions of this part *shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid*, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination.” (Emphasis supplied)

This statute made it imperative that a clear and precise definition of “paid” be established and understood among shippers and carriers of freight in interstate commerce.

The rulings of the Interstate Commerce Commission make it clear that payment by check constituted payment within the meaning of the statute. Thus, in *Ex Parte No. 73*, 57 ICC Reports 591, 593, 596, 596B (1920) the Commission considered the meaning of “payment” in the above-quoted provision. It quoted from Circular No. 9, dated June 29, 1918, issued by the Director of Public Service and Accounting in the U.S. Railroad Administration:

“Assume, for example, that freight is delivered to such regular customer on Monday and that the freight bill is mailed or delivered on the same day to the shipper or consignee, being received by him in due course on the morning of the next day.

²⁹ 49 U.S.C., Sec. 3(2).

If, now, the shipper or consignee remits his check for the amount during Tuesday so that it may be received by the carrier the morning of Wednesday, that is to be treated as a cash transaction. The bill is presented and paid in due course of business and no period of credit in the ordinary acceptance of that term is given." (Emphasis supplied)

It is to be observed that the remittance of a check is treated as a payment in the foregoing quotation.

The Commission continued:

"The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery of most shipments, and, while adhering to the principle of prompt payment of charges should, upon certain freight traffic, give opportunity for the preparation of freight bills at destination, weights to be ascertained after the the carriers have relinquished possession of freight, and for the presentation of freight bills to the appropriate offices and employees of shippers by United States mail, by messenger, or by other proper means, and for payment of the charges in the regular course of business by the shippers. An order will be issued in accordance with these conclusions."

The order then provides for a period of "credit" of 96 hours and concludes that:

"... valid checks, drafts, or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, *may be deemed to be payment of the tariff charges* within the period of ninety-six hours of credit . . ." (Emphasis supplied)

In 1931, the Commission was asked to revise its rules, and in *Ex Parte* 73, 171 ICC Reports 268, 273, 282, it refers to the argument of shippers that if credit were permitted "they can reduce the number of necessary checks now drawn" and "that they should be allowed to accumulate freight bills and pay them by one or two checks once or twice a week."

The Commission reviewed its former order and decided to keep it in effect with certain changes. The order included a provision, very similar to its predecessor quoted above; in which again it was provided that:

"... valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of the rules ..."

In the foregoing rules, and the preambles to them, the Commission recognizes and endorses officially the accepted usage among shippers and carriers that remittance by check is payment of freight charges.

The Supreme Court of the United States has recognized the practice and confirmed its validity under the Interstate Commerce Act. In *Fullerton Lumber Co. v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U.S. 520, 521-2, 75 L.ed. 502, 51 S.Ct. 227 (1931), the court held that the requirement for payment in cash permitted payment by check. Mr. Justice Brandeis said:

"It has long been settled that payment of a carrier's charges must be made in money; and that

the payment must be in cash as distinguished from credit. The purpose of the requirement is solely to prevent rebates or unjust discrimination and to insure observance of the tariff rates. [Citing authorities] The Interstate Commerce Act does not in terms prescribe that the charges shall be paid in money; that is, in coin or currency. *There is no reason for denying to the parties the convenience and safety of making payment, in accordance with the prevailing usage of the business, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.*" (Emphasis supplied)

(3) "Paid" and "payment" have been construed as meaning the giving and receipt of a check under other sections of the Internal Revenue Code

A final argument against any contention that "paid" should be construed as excluding the delivery and receipt of a check, arises from the construction of other parts of the Internal Revenue Code.

Delivery and receipt of a check—as contrasted with negotiation or payment—have been held to be payment within the revenue laws in the following contexts:

(a) As income of the recipient as of the date of receipt of the check.

Kahler v. Commissioner, 18 T.C. 31 (1952);

Butler v. Commissioner, 19 BTA 718 (1930).

(b) As a payment of a charitable contribution within the relevant provision governing deductions.

Estate of Spiegel v. Commissioner, 12 T.C. 524 (1949).

(c) As a payment of real estate taxes giving rise to

a deduction for "taxes paid . . . within the taxable year."

Estate of Bradley v. Commissioner, 19 BTA 49 (1930).

In *Estate of Spiegel v. Commissioner*, 12 T.C. 524, 529 (1949), *supra*, the tax court gave exhaustive consideration to the question whether a "payment" within the meaning of Section 23(o) of the Internal Revenue Code of 1939, as amended, took place in the year in which a check was given and received by a charitable institution or in the year in which the check was negotiated and paid. In holding that the "payment" meant the giving and receipt of the check, the court said:

"It would seem to us unfortunate for the Tax Court to fail to recognize what has so frequently been suggested, that as a practical matter, in everyday personal and commercial usage, the transfer of funds by check is an accepted procedure. The parties almost without exception think and deal in terms of payment except in the unusual circumstances, not involved here, that the check is dishonored upon presentation, or that it was delivered in the first place subject to some condition or infirmity which intervenes between delivery and present action . . .

"With knowledge of the prevalence of this practice, and of the necessity of treating tax questions from a practical rather than a theoretical viewpoint, it would be astonishing indeed if by the use of the word 'payment,' in section 23(o), Congress did not intend to include a check given absolutely and in due course subsequently presented and paid . . ."

CONCLUSION

Under the cases and principles cited above, the lower court erred in extending the plainly and unambiguously stated scope of the excise tax statute under consideration by construction. Without any contention that there was ambiguity in the statute, the court sanctioned the sudden arbitrary reversal by the Commissioner of Internal Revenue of seven and one-half years of recognition of the plain meaning of the statute. It endorsed the incredible legerdemain through which the phrase "within the United States" was made to embrace its antithesis, "without the United States," without benefit of statutory amendment, and thus render itself entirely meaningless. This extreme and unprecedented result was reached solely on the basis of an assumed intent of Congress, the quest for which was, as we have pointed out above, not only unsanctioned by authority but infelicitous factually. What is, in effect, an amendment of a statute in this manner, transcended the historic function of the judiciary to interpret and not make the laws, and the traditional rules of judicial self-restraint which are rooted in the constitutional doctrine of separation of powers. We submit that the judgment of the district court should be reversed with directions that the court enter a judgment in favor of appellant and against appellee in the sum of \$78,937.17, together with interest thereon as provided by law.

Respectfully submitted,

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APPENDIX A

**I. R. C. Section 3475 as Added to the Internal Revenue
Code of 1939 by Section 620(a) of the Revenue
Act of 1942**

“SUBCHAPTER E—TRANSPORTATION OF PROPERTY

“Section 3475. *Transportation of property*

“(a) *Tax.* There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

“(b) *Exemption of government transportation.* . . .

“(c) *Returns and payment.* The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of

the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so collected to the collector in the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the Collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe.

“(d) *Extensions of time . . .*

“(e) *Registration . . .*”

APPENDIX B

TABLE OF EXHIBITS

The following exhibits were identified, offered and admitted in evidence without objection at the trial of this case on September 6, 1957:

<i>Exhibit</i>	<i>Description</i>	<i>Record</i>
No. 1	Recapitulation of transportation taxes paid.	R. 43
No. 2	Check No. 37601 dated September 25, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce, Seattle, Wash., payable to the order of Chicago and North Western Railway Company in the sum of \$452.55, together with two freight bills paid by said check.	R. 43-44
No. 3	Check No. 36610 dated September 8, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce, Seattle, Wash., payable to the order of Chicago, Burlington & Quincy Railroad Company in the sum of \$664.11, together with the freight bills paid by said check.	R. 44
No. 4	Check No. 24676 dated July 13, 1950, drawn by Pacific Fruit & Produce Company on the Seattle-First National Bank of Seattle, Wash., to the order of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in the sum of \$532.85, together with freight bill paid by the said check.	R. 44
No. 5	Check No. 38698 dated October 9, 1950, drawn by Pacific Fruit & Prod-	R. 44

<i>Exhibit</i>	<i>Description</i>	<i>Record</i>
	uce Company on the National Bank of Commerce, Seattle, Wash., to the order of the Colorado and Southern Railway Company, in the sum of \$35.02, together with freight bill paid by the said check.	
No. 6	Check No. 38983 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., to the order of Great Northern Railway Company, in the sum of \$632.52, together with freight bill paid by the said check.	R. 44
No. 7	Check No. 38988 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Northern Pacific Railway Company in the sum of \$202.59, together with two freight bills paid by said check.	R. 45
No. 8	Check No. 38987 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Southern Pacific Company, in the sum of \$13.36, together with two freight bills paid by said check.	R. 45
No. 9	Check No. 37621 dated September 25, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle,	R. 45

<i>Exhibit</i>	<i>Description</i>	<i>Record</i>
	Wash., payable to the order of Spokane, Portland and Seattle Railway Company, in the sum of \$380.45, together with three freight bills paid by said check.	
No. 10	Check No. 38984 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Union Pacific Railroad Company in the sum of \$8.20, together with freight bill paid by said check.	R. 45
No. 11	Office copy of Check No. 15712 dated July 24, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minnesota, payable to the order of Illinois Central Railroad Company, in the sum of \$373.04, together with office copies of three freight bills paid by said check.	R. 46
No. 12	Office copy of Chec No. 06365 dated October 17, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minnesota, payable to the order of Chicago, St. Paul, Minneapolis & Omaha Railway Co., in the sum of \$374.07, together with office copy of freight bill paid by said check.	R. 46
No. 13	Office copy of Check No. 15708 dated July 24, 1950, drawn by Gamble-Robinson Company on the North-	R. 46

<i>Exhibit</i>	<i>Description</i>	<i>Record</i>
	western National Bank, Minneapolis, Minn., payable to the order of Chicago Great Western Railway Company, in the sum of \$173.42, together with office copy of freight bill paid by said check.	
No. 14	Office copy of Check No. 01124 dated August 10, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Chicago, Rock Island & Pacific Railroad Co., in the sum of \$786.93, together with office copy of freight bill paid by said check.	R. 46
No. 15	Office copy of Check No. 15388 dated July 13, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., in the sum of \$623.90, together with office copy of freight bill paid by said check.	R. 47
No. 16	Office copy of Check No. 15373 dated July 12, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Minneapolis & St. Louis Railway Co., in the sum of \$627.99, together with office copy of freight bill paid by said check.	R. 47

<i>Exhibit</i>	<i>Description</i>	<i>Record</i>
No. 17	Miscellaneous Tax Rulings of Commissioner of Internal Revenue, 1943: M.T. 15 (1943 Cum. Bull. p. 1158-9); M.T. 9 (1943 Cum. Bull. p. 1159-60); M.T. 13 (1943) Cum. Bull, p. 1161); M.T. 18 (1943 Cum. Bull. p. 1162).	R. 70
No. 18	Miscellaneous Tax Ruling of Commissioner of Internal Revenue, 1948: M.T. 26 (1948-1 Cum. Bull. p. 141).	R. 70
No. 19	Miscellaneous Tax Ruling of Commissioner of Internal Revenue, 1949: M.T. 35 (1949-1 Cum. Bull., p. 250).	R. 70
A-1	Mimeograph letter (Mim. 5447, 1942-2 Cum. Bull. p. 280) dated December 7, 1942.	R. 47
A-2	Treasury Department Press Release S-2100, dated Friday, September 2, 1949.	R. 47
A-3	Letter ruling of Acting Commissioner of Internal Revenue, dated April 11, 1950.	R. 47
A-4	Letter ruling of Deputy Commissioner of Internal Revenue, dated June 28, 1950.	R. 47
A-5	Treasury Department Press Release S-2389, dated Friday, July 7, 1950.	R. 47

No. 15820

United States
Court of Appeals
for the Ninth Circuit

BOSTON INSURANCE COMPANY, a corpora-
tion, Appellant,

vs.

HYRUM JENSEN, individually and doing busi-
ness as Eureka Lumber Company, Appellee.

Transcript of Record

(In Two Volumes)

Volume I.

(Pages 1 to 300, Inclusive)

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED

FEB 25 1958

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Insurance Co.



In The Superior Court of the State of California
In and For The County of Humboldt

No. 32725

HYRUM JENSEN, individually and doing business as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corporation, DOES ONE to TEN, Defendant.

COMPLAINT FOR MONEY
DUE ON CONTRACT

Comes now the plaintiff above named, and for cause of action alleges as follows:

I.

That the plaintiff is a resident of the County of Humboldt, State of California, and has complied with all statutes regarding the filing and publication of certificate of doing business under a fictitious name; that the defendant is a corporation licensed and doing business as an insurance company, selling policies of fire insurance and contracts of fire insurance coverage within the State of California.

II.

That plaintiff on or about the 21st day of May, 1956, entered into a contract in writing with defendant wherein and whereby the defendant promised to pay to the plaintiff the sum of \$20,000.00

or such other lesser sum as the facts indicated upon a fire loss sustained by the plaintiff, which said contract is in the standard form fire insurance policy of the State of California and a true photostatic copy of which is set forth as Exhibit A annexed hereto and incorporated by reference herein as if fully set forth, being Boston Insurance Company Policy No. 560594, wherein and whereby the defendant obligated itself upon the occurrence of fire loss to the plaintiff to pay the sum of \$20,000.00 or such lesser sum as the loss would indicate.

III.

The plaintiff has fully performed each and every all and singular the covenants and conditions by him to be performed under and by virtue of the agreement as set forth as Exhibit A herein; that on or about June 25, 1956 in the City of Eureka, County of Humboldt, the stock and inventory of the plaintiff was lost and consumed by hostile fire, to the damage of plaintiff as hereinafter set forth and upon the occurrence of the said event and thereafter up to the filing of this complaint, the plaintiff has complied with and has performed each and every, all and singular the covenants and conditions set forth in the said contract attached hereto as Exhibit A by him to be performed, both before and after the occurrence of the said fire loss.

IV.

That after the said fire loss and on August 23, 1956, the plaintiff caused to be served upon the defendant a verified Proof of Loss on the form pre-

scribed by the defendant and containing all the information required to be contained by the said contract as set forth as Exhibit A, which said Proof of Loss demonstrated the loss by plaintiff in excess of the amount of \$20,000.00, which said Proof of Loss by true photostatic copy is set forth as Exhibit B hereto and incorporated herein by reference and made a part hereof as if wholly set forth.

V.

That more than sixty days have elapsed since the service of Proof of Loss upon the defendant herein and that within said time no statement has been received by plaintiff from defendant that there is a disagreement as to the amount of the said loss, and that the said plaintiff has, after serving notice of Proof of Loss upon defendant, demanded in writing that in the event of any disagreement by the defendant as to the amount of loss that the defendant forthwith appoint an appraiser as provided in Exhibit A herein and that the said defendant has failed, refused and neglected to appoint said appraiser and has failed and refused and neglected to indicate its disagreement to the Proof of Loss as set forth in Exhibit B; that under the terms of Exhibit A herein, there is due, owing and unpaid from the defendant to the plaintiff the sum of \$20,000.00 from and after October 22, 1956; that more than twenty days have elapsed since the demand of plaintiff that defendant appoint an appraiser and defendant has failed, refused and neglected to appoint any appraiser.

VI.

That the plaintiff has demanded of defendant that the same be forthwith paid and that the defendant has failed, refused and neglected to pay to the plaintiff the sum of \$20,000.00 as aforesaid although plaintiff has in every respect fully performed each and every, all and singular the covenants of the contract set forth as Exhibit A and defendant has failed, refused and neglected to perform any of the covenants thereof.

VII.

Wherefore, there is due, owing and unpaid to the plaintiff from the defendant the sum of \$20,000.00 together with interest from the 22nd day of October, 1956 at the rate prescribed by law, the same as a direct and proximate result of the failure, refusal and neglect of the defendant for \$20,000.00 plus interest from the 22nd day of October, 1956 at the rate prescribed by law, plus costs of suit herein, plus any and other relief as to the court seems indicated.

FREDERICK L. HILGER,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed Dec. 31, 1956.

In The United States District Court, Northern
District of California, Northern Division

No. 7489 (Civil)

HYRUM JENSEN, individually and doing busi-
ness as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corpora-
tion, DOES ONE to TEN,
Defendants and Third Party Plaintiff,

vs.

HYRUM JENSEN and HAROLD DEE JEN-
SEN, Third Party Defendants.

THIRD PARTY COMPLAINT

With permission of the above entitled Court first had, by way of third party complaint, for cause of action against the above named third party defendants, Hyrum Jensen and Harold D. Jensen, third party plaintiff Boston Insurance Company (hereinafter referred to as "Company") alleges that:

1. That Hyrum Jensen and Eureka Lumber Company have filed a complaint against Company, and a true and correct copy of which is hereto attached as Exhibit "A".

2. At all times hereinafter mentioned Company

was, and still is, a corporation duly organized and existing according to the laws of the State of Massachusetts in the United States of America, and was, and still is, admitted to transact fire insurance business in the State of California, and has complied with the laws imposing conditions precedent to the transaction of such business in such State of California.

3. At all times hereinafter mentioned each of third party defendants was a resident of and resided in the County of Humboldt, State of California.

4. On or about the 29th day of May, 1956, Company executed and delivered to Eureka Lumber Company a California standard form of fire insurance policy with endorsements, covering stock all situate at the premises at the north side of 3rd Street, northwest corner of Commercial Street, Eureka, California.

5. Under the terms of such insurance contract, Company insured Eureka Lumber Company against all direct loss by fire except as otherwise therein provided to the extent of the actual cash value of the said stock at the time of loss, but in no event for more than the interest of Eureka Lumber Company and not to exceed the sum of \$20,000.00.

6. Said standard form of fire insurance policy provides that Company may require from Eureka Lumber Company an assignment of all right of recovery from any party for loss to the extent of the payment therefor is made by Company.

7. Company believes and therefore upon information and belief alleges that prior to the fire of June 25, 1956, at said premises said third party defendants Hyrum Jensen and Harold D. Jensen wilfully and with intent to injure, prejudice and damage Company, entered into a conspiracy to set fire to, and cause said stock to be burned.

8. Company believes and therefore alleges upon information and belief that on said 25th day of June, 1956, pursuant to such conspiracy said Hyrum Jensen and Harold D. Jensen wilfully, intentionally, negligently and carelessly caused and set fire to said stock thereby destroying said stock.

9. In the event Company is required to pay any sum under such insurance contract on account of said fire and loss caused by said acts by said Hyrum Jensen and Harold D. Jensen, by virtue of which Company is liable to said Eureka Lumber Company for damages, Company is entitled to a judgment against said third party defendants Hyrum Jensen and Harold D. Jensen for such sum.

10. This third party complaint is filed herein in order to determine in one action the respective rights and obligations of each of Company and said third party defendants and to avoid a multiplicity of actions, and that all of said rights and obligations arise out of and are related to the same transaction, and can be settled and determined by a judgment in this action.

Wherefore, Company prays judgment against

said third party defendants Hyrum Jensen and Harold D. Jensen for all sums that may be adjudged against said third party plaintiff in favor of said Eureka Lumber Company and/or Hyrum Jensen, for costs of suit and such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant and Third Party Plaintiff
Boston Insurance Company.

[Endorsed]: Filed Jan. 4, 1957.

In The United States District Court, Northern
District of California, Northern Division

No. 7489 (Civil)

HYRUM JENSEN, individually and doing business as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corporation, et al.,
Defendants.

ANSWER TO COMPLAINT

Defendant Boston Insurance Company, a corporation, answers the complaint of plaintiff filed in the above entitled action, as follows:

First Defense

1. Defendant answers Paragraph I of said complaint, as follows:

Defendant admits that Hyrum Jensen was a resident of the State of California, and that defendant was, and is, a corporation organized and existing according to the laws of the State of Massachusetts in United States of America authorized and qualified to transact fire insurance business in the State of California.

Defendant denies each and every allegation in said Paragraph I not hereinbefore admitted.

2. Defendant answers Paragraph II of said complaint, as follows:

Defendant admits that the form of fire insurance policy in said Exhibit "A" is a California standard form of fire insurance policy.

Defendant denies each and every allegation in said Paragraph II not hereinbefore admitted.

3. Defendant answers Paragraph III of said complaint, as follows:

Defendant admits that on June 25, 1956, a fire occurred in a building at the location described in Exhibit "A" and that stock was damaged in such fire.

Defendant denies each and every allegation in said Paragraph III not hereinbefore admitted, and in this connection incorporates as a part hereof all of the allegations contained in the Second to Seventh Defenses, inclusive, hereinafter set forth.

4. Defendant answers Paragraph IV of said complaint, as follows:

Defendant admits that on August 24, 1956, it received a "Sworn Statement in Proof of Loss," dated August 22, 1956, in the form set forth in said Exhibit "B".

Defendant denies each and every allegation in said Paragraph IV not hereinbefore admitted, and in this connection denies that said Proof of Loss demonstrated a loss in excess of \$20,000.00, or in any part thereof, or at all.

5. Defendant answers Paragraph V of said complaint, as follows:

Defendant admits that more than 60 days elapsed after the receipt by it of said Sworn Statement in Proof of Loss; and, that after the expiration of said period of 60 days, while plaintiff Eureka Lumber Company was in default and had not complied with the provisions and stipulations of said insurance contract in said Exhibit "A", plaintiff requested an appraisal, and defendant has not appointed an appraiser.

Defendant denies each and every allegation contained in said Paragraph V not hereinbefore admitted, and in this connection denies that said sum of \$20,000 or any part thereof, is due, owing or unpaid by said defendant to plaintiff.

6. Defendant answers Paragraph VI of said complaint, as follows:

Defendant admits that plaintiff has demanded said sum of \$20,000.00 and that defendant has not paid the same, or any part thereof.

Defendant denies each and every allegation in said Paragraph VI not hereinbefore admitted, and in this connection incorporates as a part hereof said Second to Seventh Defenses, inclusive.

7. Defendant denies each and every allegation contained in Paragraph VII of said complaint, and in this connection denies that the said sum or any part thereof is due or owing to plaintiff.

Second Defense

1. Defendant alleges that said standard form of California fire insurance policy provides, in part, as follows:

(a) Lines 157-161 provide:

“Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, and unless commenced within 12 months next after inception of the loss.”

(b) Lines 150-156 provide:

“When Loss Payable. The amount of loss for which this Company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by filing with this Company an award as herein provided.”

(c) Lines 113-122 provide:

“Requirements in Case Loss Occurs:

“* * * the insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examination under oath by any person named by this Company and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.”

(d) Lines 11-24 provide:

“Perils not Included.

“This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by; * * * (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss when the property is endangered by fire from the neighboring premises;”

(e) Lines 28-31 provide:

“Conditions suspending or restricting insurance.

“Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured; * * *”

(f) Lines 1-6 provide:

“Concealment, Fraud.

“This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

On September 26, October 8 and 19, and November 7, 1956, pursuant to said lines 113-122, defendant requested plaintiff to exhibit to a representative of said defendant at the City of Eureka, all books of account, bills, invoices and other vouchers, or certified copies thereof, if the originals be lost, and copies of the income tax returns of Hyrum Jensen and Dee Jensen and/or Eureka Lumber Company for the calendar years 1953, 1954 and 1955.

Defendant alleges that in violation of said policy provisions, plaintiff refused to and did not produce prior to the commencement of this action, the following records:

(a) General ledger for the calendar years 1954, 1955 and 1956;

(b) Accounts receivable ledger;

(c) Combination cash and sales journal;

(d) All vendors invoices and statements for 1956;

(e) All sales invoices for 1956;

(f) All correspondence for 1956;

(g) All payroll records including the entire month of June, 1956;

(h) All cancelled checks of the Eureka Lumber Company for 1956;

(i) All bank statements together with cancelled checks of Harold D. Jensen for 1955 and 1956;

2. On October 8, 1956, pursuant to said policy lines 113-122 defendant requested said Dee Jensen, son of said Hyrum Jensen, to submit to an Examination Under Oath by its representative at the City of Eureka on October 12, 1956. Defendant alleges that in violation of said policy provisions, said Dee Jensen has refused to appear for such Examination Under Oath and plaintiff has refused to produce such Dee Jensen for such an Examination Under Oath prior to the commencement of this action.

Third Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that it is not liable for such loss because such loss, if any, was caused, directly or indirectly, by the neglect of plaintiff to use all reasonable means to save and preserve the property at and after such fire.

Fourth Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that it is not liable for such loss because the hazard of such loss, if any, was increased by means within the control and knowledge of plaintiff.

Fifth Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that after the alleged loss and damage and before the commencement of this action, in violation of said policy lines 1-6, Hyrum Jensen wilfully concealed, misrepresented and swore falsely and fraudulently concerning the following material facts and circumstances:

(a) In said Proof of Loss and in an Examination Under Oath, said Hyrum Jensen stated that the cause and origin of said fire was unknown to him; whereas, in fact, the cause and origin of said fire were known to him.

(b) In said Proof of Loss and said Examination Under Oath, said Hyrum Jensen stated that the cash value of said property at the time of loss was \$63,549.54 and that the whole loss and damage was \$33,549.54; whereas, in fact, Hyrum Jensen knew that neither said cash value of said property nor said loss and damage was in said amounts.

(c) In said Proof of Loss and said Examination Under Oath, said Hyrum Jensen stated that at the time of the loss that the interest of Eureka Lum-

ber Company in the property described was entire, and no other person had any interest therein; whereas, in fact, he knew that others than the Eureka Lumber Company had an interest in said property.

(d) In said Proof of Loss and said Examination Under Oath, said Hyrum Jensen stated that since said policy was issued there was no change of interest in the property described; whereas, in fact, he knew that the changes of interest had occurred.

(e) In said Proof of Loss and said Examination under Oath, said Hyrum Jensen stated that since said policy was issued there had been no change in the exposure of said property; whereas, in fact, he knew that a change had occurred in the exposure of said property.

(f) In said Examination Under Oath, said Hyrum Jensen denied that said Dee Jensen, also known as and called Harold D. Jensen, had an interest in said property; whereas, in fact, he knew that said Dee Jensen had an interest in said property. Each of said statements made by said Hyrum Jensen was false and fraudulent and made with the intent to induce defendant to pay said sum of \$20,000.00.

Sixth Defense

1. Defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph 1 of the foregoing Second Defense the same as if specifically set forth herein.

2. Defendant alleges that it is informed and believes and therefore alleges:

(a) That prior to the fire on June 25, 1956, said Hyrum Jensen and Harold D. Jensen entered into a conspiracy to falsify and puff up the value of said stock, and thereafter to cause such stock to be burned with the intent to defraud defendant of said amount of insurance.

(b) That pursuant to said conspiracy, on or about June 25, 1956, said Hyrum Jensen and said Harold D. Jensen wilfully set fire to and caused said stock to be burned.

(c) That pursuant to said conspiracy on August 24, 1956 said Hyrum Jensen delivered to said defendant said false and fraudulent sworn statements in said Proof of Loss and damage and in said Examination Under Oath as set forth in said Fifth Defense.

(d) That pursuant to said conspiracy and after said fire and before the commencement of this action, said Hyrum Jensen refused to produce said records set forth in said Second Defense, and said Hyrum Jensen refused to produce and said Dee Jensen refused to appear for said Examination Under Oath.

Seventh Defense

Said defendant is informed and believes and therefore alleges that said Harold D. Jensen is a real party in interest herein, and can be made a party without depriving this Court of jurisdiction

of the present parties, and has not been made a party.

Wherefore, said defendant prays that said plaintiff take nothing and defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 7, 1957.

[Title of District Court and Cause.]

ANSWER TO THIRD-PARTY COMPLAINT

Comes now the Third Party Defendant, Hyrum Jensen, and by way of Answer to the Third Party Complaint on file herein, denies, avers and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the said Third Party Complaint.

II.

Has no information or belief respecting the allegations of Paragraph II of the said Third Party Complaint.

III.

Admits the allegations of Paragraph III of the Third Party Complaint.

IV.

Admits the allegations of Paragraph IV of the said Third Party Complaint.

V.

Admits the allegations of Paragraph V of the said Third Party Complaint.

VI.

Admits the allegations contained in Paragraph VI of the said Third Party Complaint.

VII.

Denies, each and every, all and singular, conjunctively and disjunctively, the allegations set forth in Paragraph VII of the said Third Party Complaint.

VIII.

Denies, each and every, all and singular, conjunctively and disjunctively the allegations of Paragraph VIII of the said Third Party Complaint.

IX.

Denies each and every, all and singular, conjunctively and disjunctively, the allegations contained in Paragraph IX of the said Third Party Complaint by virtue of the foregoing denials of the allegations of Paragraphs VII and VIII of the said Third Party Complaint.

Wherefore, Third Party Defendant Hyrum Jensen, having fully answered the said Third Party Complaint on file herein by the Boston Insurance Company, prays that the Boston Insurance Company take nothing by its Third Party Complaint

and that the Third Party Defendant be dismissed hence together with his costs of suit and for such other and further relief as is just and proper in the premises.

/s/ FREDERICK L. HILGER,
Attorney for Third Party
Defendant, Hyrum Jensen.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed January 22, 1957.

[Title of District Court and Cause.]

ANSWER TO THIRD-PARTY COMPLAINT

Comes now the Third Party Defendant, Harold D. Jensen, and by way of Answer to the Third Party Complaint on file herein, admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the said Third Party Complaint.

II.

Has no information or belief respecting the allegations of Paragraph II, of the said Third Party Complaint.

III.

Admits the allegations of Paragraph III of the Third Party Complaint.

IV.

Admits the allegations of Paragraph IV of the said Third Party Complaint.

V.

Admits the allegations of Paragraph V of the said Third Party Complaint.

VI.

Admits the allegations contained in Paragraph VI of the said Third Party Complaint.

VII.

Denies, each and every, all and singular, conjunctively and disjunctively, the allegations set forth in Paragraph VII of the said Third Party Complaint.

VIII.

Denies, each and every, all and singular, conjunctively and disjunctively the allegations of Paragraph VIII of the said Third Party Complaint.

IX.

Denies, each and every, all and singular, conjunctively and disjunctively, the allegations contained in Paragraph IX of the said Third Party Complaint by virtue of the foregoing denials of the allegations of Paragraphs VII and VIII of the said Third Party Complaint.

Wherefore, Third Party Defendant Harold D. Jensen, having fully answered the said Third Party Complaint on file herein by the Boston Insurance Company, prays that the Boston Insurance Company take nothing by its Third Party Complaint and that the Third Defendant be dismissed hence together with his costs of suit and for such other

and further relief as is just and proper in the premises.

/s/ ROBERT W. HILL,

Attorney for Third Party

Defendant, Harold D. Jensen.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

PROPOSED INSTRUCTIONS REQUESTED
BY DEFENDANT AND THIRD PARTY
PLAINTIFF BOSTON INSURANCE COM-
PANY

* * * * *

Defendant's Instruction No. 3

Compliance With Conditions Precedent Required

The standard California fire insurance policy provides that:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, * * *"

In its answer, defendant has set forth that plaintiff did not comply with the following requirements of the standard California fire insurance policy in that such policy provides as follows:

"The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under

oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

When an insured has failed to comply with the requirements of the policy which require him to produce said bills, invoices and other vouchers, or copies thereof if the originals be lost or fail to submit to an examination under oath, the failure either to produce such documents or submit to such Examination Under Oath constitutes a complete defense to any action on the policy.

Hickman v. London Assurance Co. (1920) 184 Cal. 524; 195 P 45—failure to submit to examination under oath; *Baldwin v. Bankers & Shippers Ins. Co.* (1955 Cir. 9th) 222 Fed. 2d 953. *Seivel v. Lebanon Mutual Ins. Co.* (1900) 46 Atl. 851—failure to produce books and documents. *Robinson v. National Automobile Ins. Co.* (1955) 132 C. A. 2d 909, 712; 282 P2d 930—failure to answer questions in out of sight loss.

Defendant's Instruction No. 4

Burden of Proof

An insurer is not liable except upon proof that the loss has occurred within the terms of the policy and the burden of proof is upon the insured to

prove that he has performed the conditions of the policy.

Rizzutto v. National Reserve Ins. Co. (1949) 92 C. A. 2d 143; 206 P 2d 431, 432.

Defendant's Instruction No. 5

Meaning of "Shall"

As used in the Insurance Code of the State of California, and in the parts of the policy that are hereafter read to you in my instructions, the word "shall" is mandatory unless otherwise apparent from the context.

Ins. C. 16; Ins. C. 2071 re: (1) Concealment, fraud; (2) Perils not included; (3) Conditions suspending or restricting insurance; (4) Requirements in case loss occurs; (5) Suit; *Carninetti v. Superior Court* (1941) 16 Cal. 2d 838, 108 P 2d 911.

Defendant's Instruction No. 6

Perils Not Included

The California standard fire insurance policy provides:

"This company shall not be liable for loss by fire or other perils insured against in this policy caused * * * by: (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, * * *; (j) nor shall this company be liable for loss by theft."

See: Policy Lines 7-24.

* * * * *

Defendant's Instruction No. 8

Policy Void for Concealment or Fraud

The California standard fire policy provides:

“This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

Defendant's Instruction No. 9

Conspiracy Defined

A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by a criminal or unlawful means.

Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581; 98 P 1027.

Defendant's Instruction No. 10

Unlawful Acts

It is unlawful for any person to wilfully and with intent to injure or defraud an insurer either to commit fraud as defined in my instruction hereafter or set fire.

Penal Code 448 subd. (a); 450 Subd. (a); 548.

Defendant's Instruction No. 11

Conspiracy: Express Agreement

It is not necessary that two persons should meet together and enter into an explicit or formal agreement to commit the unlawful end, or that the conspiracy should be expressed in words. The law fixes no time at which a conspiracy must have been entered into, and, it may be added, it does not provide that a conspiracy have any particular duration. If,

in any manner the conspirators tacitly come to a mutual understanding to commit an unlawful end it is sufficient to constitute a conspiracy, that is, a conspiracy may result from the actions of the conspirators in mutually carrying out a common purpose to achieve an unlawful end.

People v. Montgomery (1941) 47 C. A. 2d 1; 117 P 2d 437.

Defendant's Instruction No. 12

Proof of Conspiracy by Circumstantial Evidence

A conspiracy is almost always of necessity provable only by circumstantial evidence, that is to say, by inference reasonably deduced from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing a conspiracy by direct evidence. Consequently, the conspiracy complained of may often times be inferred from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy.

Consequently, all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by you in determining whether plaintiff or cross-defendant wilfully entered into such conspiracy, or concealed, misrepresented or committed any fraud concerning this fire.

People v. Arnold (1942) 53 C. A. 2d 11; 127 P 2d

285; *People v. Kessler* (1944) 62 CA 2d 817, 823; 145 P 2d 656; *Siemon v. Finkle* (1923) 190 Cal. 611, 615; 213 P 954; *Johnson v. Morris* (1930) 210 Cal. 580, 590; 213 P 954.

Defendant's Instruction No. 13
Conspirators Liable for All Acts

When a conspiracy has been established, the act of one conspirator in furtherance of the common purpose is the act of all the conspirators; and each conspirator is equally liable for all the consequences of the conspiracy, even though they did not know the details of the scheme from its inception and regardless of the extent of their participation or the share of the moneys obtained by them.

State v. Gray (1946) 76 C. A. 2d 536; 173 P 2d 399; *Anderson V. Thacher* (1946) 76 C. A. 2d 50; 172 P 2d 553; *Mox Inc. v. Woods* (1927) 202 Cal. 675; 262 P 302.

* * * * *

Defendant's Instruction No. 15
Misrepresentation Material

Every misrepresentation is material if it influences an insurance company in paying a loss.

See: *Columbia Ins. Co. v. Lawrence* 9 L. Ed. 512 (U. S. Supreme Court 1936); *Air Chase Inc. v. National Surety Co.* (1931) S.D. NY 49 Fed. 2d 447; *Wallace v. World Fire & Marine Ins. Co.* (1947 SD cl) 70 Fed. Supp. 193 (affirmed 166 Fed. 2d 571); *Bennett v. Northwestern Nat. Ins. Co.* (1927) 84 Cal. App. 130.

* * * * *

Defendant's Instruction No. 17

Overstatements—Not Opinion

When one having a special knowledge of the property swears under oath that such property has an excessive value to one ignorant on the subject with unequal means of information, then such statement of excessive values is not a mere matter of opinion but is made with the intent that the addressee should rely on it to his injury.

Orenstein v. Star Insurance Company (10 Fed. 2d 1054); Hyland v. Millers Nat. Ins. Co. (C.C.A. 9th, 1937) 91 F 2d 735, 742.

Defendant's Instruction No. 18

Concealment—Definition

Neglect to communicate that which an insured knows and ought to communicate to an insurer is concealment.

See: Insurance Code 330.

Defendant's Instruction No. 19

Concealment—Intent

A concealment of fact, whether intentional or unintentional, which is material to the risk voids the policy. The presence of an attempt to deceive is not required to void the policy.

Gates v. General Casualty Co. of America (1941 9th Cir.) 120 Fed. 2d 925, 927; Hogel & Co. v. U. S. Fidelity & Guarantee Co. (1939) 35 C. A. 2d 171, 181; 94 P 2d 1046.

Defendant's Instruction No. 20

Disclosures Required

Every party to a contract of insurance shall com-

municate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.

Ins. Code 332.

Defendant's Instruction No. 21

Concealment—Materiality

Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contracts for making his inquiries.

Ins. Code 334.

Defendant's Instruction No. 22

Highest Good Faith

An insurance policy is a contract with the highest good faith, and it requires the exercise of good faith by the parties to the contract; if plaintiff in making his claim under this policy of insurance, for the purpose of exaggerating said claim, wilfully, knowingly, and intentionally for the purpose of recovering more than he is entitled to, made a substantial exaggeration in the amount of such claim, then the policy of insurance is void and insured is entitled to no recovery thereunder.

Fire Ins. Co. v. Merrick, 171 Maryland 476, 491; Tru-Fit Clothes v. Underwriters of Lloyds (1957 9 Fire and Cas. Cases 271, 272).

* * * * *

Defendant's Instruction No. 24

Burden of Proving Concealment, Fraud or Arson

While the burden of proving concealment, misrepresentation or fraud on the part of the plaintiff to void such policy is upon the defendant, the law does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible, as concealment, misrepresentation or fraud are usually planned and executed with stealth and secrecy. In a civil action it is proper to find that defendant has succeeded in carrying its burden of proof on the issue of concealment, misrepresentation or fraud if the evidence favoring their side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that on that issue the probability of truth favors the defendant.

Concealment, misrepresentation or fraud as to the origin of a fire is provable by circumstantial evidence, that is, by inference reasonably deduceable from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing such a concealment, misrepresentation or fraud by direct evidence, as a person who sets a fire to a building usually plans and executes his plan with stealth and secrecy. Consequently all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by you in determining whether plaintiff has wilfully concealed, misrepresented or committed any fraud concerning this fire.

* * * * *

Defendant's Instruction No. 36

No Recovery for Two Electric Motors

You are instructed that in no event can plaintiff recover anything for the two (2) electric motors listed in the Proof of Loss.

See: I—Par. "8. Excess Insurance of Building, Equipment and Stock Form.

II—Expert evidence to show: Such motors were insured by Hills & Morton, Inc., a corporation which was the sole owner of each motor, with the American National Fire Insurance Company under its policy #151093, effective June 12, 1956, for one year. American National Insurance Company paid Hills & Morton, Inc. for such motors on February 17, 1957, by its draft.

Defendant's Instruction No. 37

No Coverage for Equipment

Plaintiff did not insure himself for damage to Equipment, but only insured against damage to Stock as defined in my instructions. In no event can plaintiff be awarded damages for the loss of Equipment.

See: Exhibit 1—Policy of Insurance, re: Coverage on Equipment "NIL".

See: Paragraph 2 (Item II. Equipment Coverage) of Building, Equipment and Stock Form attached to Policy.

Defendant's Instruction No. 38

Definition of Stock Coverage

When the insurance under this policy covers Stock, such insurance shall cover on stock of goods,

wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which entered into the manufacture, packing, handling, shipping and sale of same; advertising materials; all being the property of the named insured, or sold but not removed (it being understood that the value of stock sold but not removed shall be the insured's selling price and that such value shall be considered as actual cash value in the application of any clauses forming a part of this policy).

See: Paragraph 2 (Item III Stock Coverage) of Building, Equipment and Stock Form Endorsement attached to Exhibit 1.

[Endorsed]: Filed October 1, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty Thousand Dollars (\$20,000.00).

/s/ HELMER G. BENSON,
Foreman.

[Endorsed]: Filed October 1, 1957.

In the United States District Court, Northern
District of California, Southern Division

No. 7489-Civil

HYRUM JENSEN, individually and doing business as EUREKA LUMBER COMPANY,
Plaintiff,

vs.

BOSTON INSURANCE COMPANY, a corporation,
Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on September 24, 1957, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Frederick L. Hilger, Esq., appearing as attorney for the plaintiff and Augustus Castro, Esq., and Thomas Hartwell, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on September 24, 25, 26, 27, 30 and October 1, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty Thousand Dollars (\$20,000), Helmer G. Benson, Foreman" and the Court having ordered

that judgment be entered herein in accordance with said verdict, with interest at the rate of 7% thereon from October 22, 1956 through October 1, 1957, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Twenty Thousand and No/100 (\$20,000.00) Dollars, together with interest at the rate of 7% from October 22, 1956 through October 1, 1957 in the sum of One Thousand Three Hundred Thirty-eight and 60/100 (\$1,338.60) Dollars, together with his costs herein taxed in the sum of \$303.30.

Dated: October 2, 1957.

/s/ C. W. CALBREATH,
Clerk.

[Endorsed]: Filed October 2, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT NOT-
WITHSTANDING VERDICT, AND IN
THE ALTERNATIVE MOTION FOR NEW
TRIAL

To: Hilger & Thomas, Attorneys for Plaintiff and
Third Party Defendants, Hyrum Jensen and
Harold Dee Jensen:

Take Notice that the undersigned will bring the
above Motion on for hearing before this Court at

the United States Post Office Building, City of San Francisco, State of California, on the 25th day of October, 1957, at 10:00 a.m., or as soon thereafter as counsel can be heard.

Dated: October 11, 1957.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant and
Third Party Plaintiff.

[Title of District Court and Cause.]

MOTION OF DEFENDANT AND THIRD
PARTY PLAINTIFF FOR JUDGMENT
NOTWITHSTANDING VERDICT, AND IN
THE ALTERNATIVE MOTION FOR NEW
TRIAL

Defendant and Third Party Plaintiff (hereinafter referred to as "Defendant") hereby moves the Court, as follows:

I. Under Rule 50 of the Federal Rules of Civil Procedure to have the verdict and judgment entered heretofore in the above entitled action in favor of plaintiff and third party defendant set aside, and to have judgment entered in accordance with the Motion for Directed Verdict made by defendant at the close of all the evidence. Exhibit "A" hereto attached and hereby made a part hereto is a draft of the proposed order requested by defendant.

The Motion is made upon the Notice attached

hereto and upon all the records and files in such action, including all of the testimony, all exhibits in the proceedings had upon the trial of such action.

The Motion is made upon the grounds that at the close of all the evidence, defendant made a Motion for a Directed Verdict which should have been granted, but which was denied. Further, such Motion is made upon all of the grounds heretofore stated as grounds for said Motion of a Directed Verdict; and upon each of the following grounds:

(a) Under the uncontradicted evidence defendant established as a matter of law that it was entitled to a judgment, because the plaintiff did not comply with all the requirements of the subject policy in that, first, under the policy, defendant requested that plaintiff produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at the City of Eureka, California, on October 12, 1956, and to permit extracts and copies thereof to be made; and prior to the trial of such action plaintiff did not produce any books of account, except cash book, bills, invoices or other vouchers for the calendar year 1956, supporting the "out of sight" loss. It was the uncontradicted evidence of Ellen Van Harpen, bookkeeper for plaintiff, for more than one year immediately preceding and at the time of said fire, that there were complete books of account and invoices, and that after the fire such books of account and invoices were legible and useable.

(b) Under the terms of the subject policy, defendant requested Harold Dee Jensen to submit to an Examination Under Oath in the City of Eureka, on October 12, 1956, and subscribe the same, that after receiving notice of such request Harold Dee Jensen, who was either a part owner of the named insured Eureka Lumber Company or an employee thereof, refused to appear for an Examination Under Oath.

II. In the event the foregoing Motion for Judgment Notwithstanding the Verdict is denied, then, in the alternative, defendant hereby moves this court under Rule 59 of the Federal Rules of Civil Procedure to vacate and set aside said verdict and judgment and grant defendant a new trial. Exhibit "B" hereto attached and hereby made a part hereof is a draft of the proposed order for new trial.

The Motion for New Trial is made upon the Notice of Motion attached hereto and upon all the records, papers and files herein including the testimony and proceedings had upon the trial of this action and the exhibits introduced in evidence marked for identification, including the instructions of the Court, rulings of the Court and instructions proposed by defendant.

Such Motion is made upon each of the following grounds:

- (a) Verdict is against the law;
- (b) Verdict is against the weight of evidence;
- (c) Verdict is contrary to the evidence;
- (d) The evidence is insufficient to sustain the verdict;

(e) Errors of law occurring at the trial duly objected and excepted to, including instructions given by the Court and the refusal of the Court to give instructions proposed by defendant to which denial defendant duly excepted, and rulings upon the admission of evidence.

Dated: October 11, 1957.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant and
Third Party Plaintiff.

[Title of District Court and Cause.]

EXHIBIT "A"
ORDER

Defendant and Third Party Plaintiff Boston Insurance Company having duly moved the above entitled Court to vacate and set aside the verdict and judgment heretofore rendered in favor of plaintiff and third party defendant Hyrum Jensen, and against said defendant and third party plaintiff and having moved the Court to render and enter judgment in accordance with its Motion for a Directed Verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said Motion, and the Court being fully advised, it is hereby ordered, adjudged and decreed:

1. That the verdict and judgment herein be, and they are hereby vacated and set aside, and judgment against said plaintiff and third party defendant and

in favor of defendant and third party plaintiff Boston Insurance Company be entered in accordance with defendant's Motion for Directed Verdict heretofore made;

2. That said plaintiff and third party defendant take nothing and that defendant and third party plaintiff Boston Insurance Company have and recover its costs of suit herein.

Done in Open Court this.....day of....., 1957.

.....,
Judge of the United States
District Court.

[Title of District Court and Cause.]

EXHIBIT "B"

ORDER

Defendant and Third Party Plaintiff Boston Insurance Company having duly moved the above entitled Court in the alternative, to vacate and set aside the verdict and judgment herein heretofore rendered in favor of plaintiff and third party defendant Hyrum Jensen and against defendant and third party plaintiff, and the matter having been heard and submitted to the Court, and the parties having appeared in the making and hearing of said Motion, and the Court being fully advised, it is hereby ordered, adjudged and decreed:

1. That such verdict and judgment be, and they are hereby vacated and set aside, and a new trial of this action is hereby granted to defendant and third party plaintiff Boston Insurance Company.

Done in Open Court thisday of.....,
1957.

.....,

Judge of the United States
District Court.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 11, 1957.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Friday, the 25th day of October, in the year of our Lord one thousand nine hundred and fifty-seven.

Present: The Honorable Louis E. Goodman, District Judge.

Civ. 7489

[Title of Cause.]

This case came on regularly this day for a hearing on the motion for judgment notwithstanding the verdict, or in the alternative for a new trial. Frederick L. Hilger, Esq., was present for and on behalf of the plaintiff. Augustus Castro, Esq., was present for and on behalf of the defendant. After hearing counsel, it is Ordered that the motion for judgment notwithstanding the verdict, or in the alternative for a new trial be and the same is hereby Denied. It is further Ordered that the defendant have a 10 day stay of execution.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant and third party plaintiff, Boston Insurance Company, a corporation, hereby appeals to the United States Court of Appeals for the 9th Circuit from the judgment entered of record in the office of the Clerk of the above entitled Court on October 2nd, 1957 in favor of the plaintiff and third party defendant and against said defendant and third party plaintiff.

Dated this 4th day of November, 1957.

/s/ AUGUSTUS CASTRO.

[Endorsed]: Filed Nov. 4, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the defendants.

Petition for removal, together with a copy of the complaint and summons.

Answer to complaint.

Third party complaint.

Answer of third party defendant Hyrum Jensen to third party complaint.

Answer of third party defendant Harold D. Jensen to third party complaint.

Defendant's proposed instructions.

Verdict.

Judgment on verdict.

Notice of motion for judgment notwithstanding verdict, or in the alternative motion for a new trial.

Order denying motion for judgment notwithstanding verdict, or in the alternative motion for a new trial.

Notice of appeal.

Supersedeas bond.

Designation of contents of the record on appeal.

Plaintiff's exhibits 1 to 21 inclusive.

Defendant's exhibits A to Z inclusive, and AA to AY inclusive.

In Witness Whereof, I have hereunto set my hand and the seal of the said Court this 10th day of December, 1957.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ By C. C. EVENSEN,
Deputy Clerk.

In the United States District Court, Northern
District of California, Northern Division

No. 7489

HYRUM JENSEN, doing business as EUREKA
LUMBER COMPANY, Plaintiff,

vs.

BOSTON INSURANCE COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the Plaintiff: Messrs. Hilger
& Thomas, by Frederick L. Hilger, Esq. For the
Defendant: Messrs. Cooley, Crowley, Gaither, God-
ward, Castro & Huddleson, by Augustus Castro,
Esq.

September 24, 1957 [1]*

(A Jury was duly impaneled to try the cause,
after which counsel for the respective parties
made opening statements to the Jury as fol-
lows:)

Opening Statement on Behalf of the Plaintiff

Mr. Hilger: If your Honor please, counsel, and
Ladies and Gentlemen of the Jury, it has been
explained to you that this is a case involving a
claim by Mr. Hyrum Jensen, the plaintiff, against
the Boston Insurance Company. We shall prove in

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

connection with our case, Ladies and Gentlemen, that in May or early June, 1956, a policy of insurance was issued covering the inventory of the Eureka Lumber Company, a sole proprietorship owned and operated by Mr. Jensen in Eureka, California. That insurance was replacement of preexisting insurance that had been covering that same property prior to the issuance of this particular policy.

Shortly after the issue of this particular policy, and on June 25, 1956, a fire occurred at the premises of the Eureka Lumber Company at Third & Commercial Streets, in Eureka. The fire broke out or was first observed and discovered approximately five minutes after 12 on that day, shortly after noon; that it was 20 minutes before the fire-fighting operators appeared on the scene; that through an unfortunate accident, wherein the fire department connected both ends of the hose to two separate fire plugs, it was another seven minutes or so before any water was applied to the fire. [2]

Our proof will show, Ladies and Gentlemen, the bulk of the stock of the Eureka Lumber Company that was affected by this fire was kiln-dried moldings loosely stacked in a building that was so constructed that a large lumber truck, such as you can observe upon the highway, could drive completely through the shed area.

Our proof will show that during that interval, while the building was burning, and particularly in the area where this dry molding was stored, that some 66,000 board feet of kiln-dried redwood moldings were entirely consumed in the flames, that ap-

proximately 35,000 board feet of redwood fence material was entirely consumed, that a portable sawmill, a small mill that had been held in stock by the Eureka Lumber Company was consumed in the flames, and the remaining portions, the diesel power unit, the wheels and pulleys were warped and so damaged by the heat and the temper taken out of the steel and that sort of thing that it is now valueless.

We will prove in connection, Ladies and Gentlemen, with the moldings, first of all, that it had before the start of the fire a reasonable market value of \$220 per thousand board feet, or a total value in excess of \$14,000. We will show that the fence material had a value prior to the fire of \$85 per thousand board feet. We will show, Ladies and Gentlemen, that under the terms of the policy of insurance any inventory on the premises of the insured which had been sold prior to the [3] occurrence of the fire "shall have as its value the sale price of the inventory that has been sold but not yet delivered, and which is damaged or consumed in the fire." That is, any inventory that has been sold but not yet delivered, and which is damaged or consumed in the fire, shall be valued at the sale price of that item.

Our proof will show, Ladies and Gentlemen, that this sawmill had been sold to Dayton Murray Truck Sales some months prior to the fire and was property awaiting delivery to them at the time of the fire.

Stored adjacent to the moldings and the lumber products that I have described we will show that

there was a warehouse containing other building material such as doors, door casings, builders hardware, roofing materials, paint, sheetrock, roofing tar, and that all of these items were damaged so as to render them worthless from the point of view of the plaintiff, who held them for sale in the ordinary course of his business. Our proof will show that there were remains of these latter items I have mentioned in the warehouse sufficient to permit the number and quantity of them to be counted by a certified public accountant and an inventory prepared and made up, which was later incorporated into a proof of loss and a demand for payment against the insurance carrier. We will show that that material had a value in and of itself of approximately \$6,000 to \$7,000. Those items of doors, paint, items where remnants remained [4] sufficient to permit counting, motors, hardware—we will show that all of these items of loss that I have mentioned were incorporated into a proof-of-loss form and submitted to the insurance carrier to support the claim for payment. The total value, we will show, of the loss, of the damage exceeded \$33,000. The policy limits are \$20,000.

Our proof will further show that we filed our proof of loss, or the plaintiff filed his proof of loss in August, 1956, and asked for the appointment of an appraiser, and no appraiser was appointed by the insurance carrier. Action was filed, which is why we are here today. Thank you, Ladies and Gentlemen.

The Court: Are you going to reserve your state-

ment, Mr. Castro, or do you want to make it now?

Mr. Castro: I would like to make the opening statement at this time, your Honor.

The Court: All right.

Mr. Castro: Counsel, I have a floor plan of the building. Would it be all right to use it in the opening statement as far as you are concerned?

Mr. Hilger: Certainly, counsel.

Mr. Castro: Your Honor, could the diagram now be marked as an exhibit for illustration purposes?

The Court: Very well.

(The chart referred to was thereupon marked Defendant's Exhibit A for identification.) [5]

Opening Statement On Behalf of the Defendant

Mr. Castro: May it please the Court, Ladies and Gentlemen of the Jury, and counsel, in defense of this case I believe the evidence will be produced by the defendants as well as from examination of the plaintiff and his witnesses in substantially the following manner:

The policy of insurance is a standard California fire insurance policy in the form prescribed by the insurance code of the State of California. It provides that in the event of fraud on the part of the insured relating to a loss, that the policy shall be void. That is the first basis of our defense in this case.

The other provisions which are involved are the provisions of the standard California fire insurance policy that requires the insured parties to submit to an examination under oath after a fire has occurred, and to produce other books and records,

such as invoices and bills and vouchers to support the loss which they are claiming. The third basis of the defense is that the fire was a set fire by Hyrum Jensen and Harold Jensen.

The evidence will show that the building that we are talking about is situated in the City of Eureka, California, and that it is approximately 92 feet in width and approximately 100 feet in depth, and it is situated at the corner of Third & Commercial Streets. The building is divided into two parts. The West half of the building, to which I am pointing, is a shed [6] area or a dirt floor area which is open at the north end and is open at the south end. The remainder of the building, the east portion of the building, is the office and warehouse section of the building with the office being the area in this corner and immediately to the north of that was some storage.

This room in the east section was used for garage purposes of an automobile. There was some storage in it. In this room there was some storage.

The evidence will show that the fire was recorded as being turned in by a box recordation in the City of Eureka, and the tape will be produced of that recordation, and it will show the fire alarm was recorded at 12:21 P.M. when the box alarm was turned in. The fire department was approximately four or five blocks from there, and it immediately went to the scene of the fire. Members of the fire department will be produced here and they will testify before you concerning those factors.

The evidence will show that the fire was discovered by third parties or outsiders when an explosion was heard, and immediately following the explosion there was observed coming out of the warehouse portion of the building black, heavy smoke. Within seconds after that explosion two men entered the building from Third Street and they went to the rear of the shed portions. At that time I expect them to testify that there was no fire in this shed area. The fire was observable in the [7] warehouse section to which I am now pointing. In the shed area, along the partition, between the two parts of the building, was a sawmill sitting on heavy planking, 12 x 12's or perhaps larger, and that sawmill blocked the entrance from Third Street, and that sawmill extended approximately between these two points to the north. These black points represent columns which I think are about 8 x 8 or 10 x 10 which supported the roof of the building.

The evidence will show that these two men then came back out of the building and went over to see whether the fire alarm had been called in. They then returned, and when they returned a second time the fire was beginning to eat through the partition wall between the two sections of the building.

The fire department arrived. When the fire department arrived the flames had come into the shed area, and that shed area is open from the dirt floor up to the roof, the roof being a corrugated metal or tin roof with joisting and members supporting it, and the fire had gone up into that area.

The fire department then put its line in through the west wall and put this fire back. This door, which is marked "Loading Door," was forced open and the fire department came through here and they observed the fire in the overhead area of this office room. They pulled down the plaster constituting the ceiling, and it was found that the fire was burning through at a point approximately here (indicating). Photographs will be [8] produced to show you that precise area.

The firemen then worked their way forward to the front of the office and into this small area marked "Door." This represents the front door of the building. They then worked their way in here and up the stairs area to the second floor, and the fire had gone from this room up into the joisting of the second floor and up to the ceiling and the roof of the second floor.

When the fire was exterminated, put out, the fire department went through the debris and they found four or five containers, which will be shown to you in photographs, situated in the area where the burning had occurred.

Counsel mentioned to you an area of 66,000 board feet of lumber. A one-gallon pail, completely open at the top, containing the remainder of diesel fluid, was found in the middle of lumber which was in this section. In this room a two-gallon container of gasoline was found with the top off. The Kaiser automobile, which was parked here, had its top taken off the gas inlet. In this room on the morning of the fire there had been placed a 50-gallon

drum of aviation gasoline, and the bung hole or top of that had been loosened.

Following that evidence pictures will be shown to you to prove that the source or origin of the fire was in this room that I have been talking about. This is a door which opens up into an alleyway (indicating). Those are railroad right-of-way [9] tracks at the rear. That door was locked from the inside at the time of the fire. When the fire department arrived you will see photographs of the fire at its inception taken by the local newspaper up there, which will show the door in its closed position. Likewise this door was in a locked position, and it will be shown in the same photographs. When the fire department arrived they forced this door or this door open—I have forgotten which it was—but they can tell you. This door along the east side was locked and was forced open by them. The only entrance to the warehouse section of the building from the front is this door to which I am pointing along Third Street, and that door was locked. When the people first tried to enter it that I told you about, the two men coming in here, they tried that door first and found it locked, and later on it was still locked when Hyrum Jensen returned to the scene of the fire.

The only other entry into this warehouse section is this point which I am pointing along the partition between the shed and the warehouse, and that door was also locked from the inside, and there will be shown you a picture of that door, how it was broken out, the hinges unhasped to take

it out of there to make an entry through there.

We will show you that the people in that building on that particular morning were Ellen Van Harpen, Mrs. Van Harpen being a lady who formerly had been in the lumber business with her husband, and she was acting as a bookkeeper and taking [10] care of the retail sales out of the office, and her task was in this approximate location. She left there shortly after 12:00 o'clock, got in her car, went over—I think she was driving her car—went over to a place called the Blue Ox, which was approximately a block away. She sat down, placed her order, and during the course of being served she heard the alarm sounded. At the time she left the only person left in the building was Harold Dee Jensen, and Mr. Jensen remained in the building alone after she left. Mr. Jensen is now deceased and the death certificate will be produced to substantiate that point.

Also after the explosion which I mentioned to you occurred in a matter of seconds Harold Jensen was seen leaving the area of this fire, and disinterested witnesses will be produced to establish the relationship at that time to the time of the explosion and what was seen.

Leaving the question of the causation of that fire and the connection of these parties with it, we will show concerning the inventory that first, under the terms of the policy, within a few weeks after the fire, we asked for the production of sellers' invoices. These people were engaged in a wholesale lumber business and a retail hardware busi-

ness, and we will show that in the normal course of business there are vendors' invoices or sellers' invoices to people, and if you have bought from them during the period of six months or a year before the fire you can normally go to your seller and he will furnish you [11] with a copy of that invoice. We had requested those records, first orally and then in writing, several times, and they have never been produced to support a claim of 66,000 board feet of kiln-dried lumber. In fact, we have invoices which will show that the lumber that he is talking about being kiln-dried during the period from August, 1955, up to the time of this fire, they had bought what we call green moldings, redwood molding, and we will show you that green redwood molding is not kiln-dried. We will show that it is not stored in the Eureka warehouse. It is kept on the outside.

Evidence will show that 66,000 board feet of molding is a sizable amount of lumber, representing approximately two carloads of lumber, and 35,000 board feet of fence board will represent approximately one carload of lumber. We are only dealing with an area in here of approximately 46 feet wide half way to the front end of the building, which would be approximately 50 feet. Counsel has already told you that this section of it, the west section of that shed, was kept in an open condition, and photographs will be produced to show you that there was a driveway through it, so storage would have to be limited to this small space that I have referred to.

Witnesses will be produced who will tell you that they were in there within a reasonable period of time before the fire, 48 hours before the fire, and that there was no redwood molding in that amount stacked in there. Redwood molding is [12] stacked in two ways. They put it on end or they put it in racks, because kiln-dried redwood molding is expensive, costing \$220 a thousand, and it is handled with so-called kid gloves, even in the lumber business.

Photographs will be shown of this area where they claim 66,000 board feet were contained, and you will see the type of lumber which is there, and it is not a lumber of the \$220 thousand class. In the area where they said they had the fence boards photographs will be shown you of that area. The burning was not heavy and you can see the pieces that were involved in that particular area.

Going one step further, evidence will be produced that the redwood which they had bought—first, the evidence will be produced to show that the Eureka Lumber Company, the man insured here, was engaged in the business primarily of buying reject lumber from mills and then they would re-sort the lumber and remanufacture it, and then they would grade it up, and that was the process which they were using with which to do their business. The evidence will show that the lumber which they were buying was being bought approximately, so far as redwood molding was concerned, at \$20 a thousand, and that this lumber had not been re-sorted or graded upward that they talked about.

The evidence will also go to show something concerning motive in this case, and that motive we believe will be a [13] financial motive. The evidence will show that Harold Dee Jensen was in financial troubles and went into bankruptcy in the fall of 1955. Following his adjudication as a bankrupt the moneys from the Eureka Lumber Company were then taken to be transferred from the Eureka Lumber Company account into his personal account. The evidence will show that beginning in January, 1956, attachments began to hit the account of Hyrum Jensen, and that those attachments hitting, more and more money appeared turning up in the bank account of Harold Dee Jensen. Up to the time of the fire there were three or four attachments, so that in June, three days before the fire, the bank account of the company was closed out and they had no bank account, and Harold Dee Jensen's bank account was reduced to about \$35.

The evidence will show that they had accounts payable in excess of, I believe, \$75,000. They had notes payable in substantially the same amount, that the creditors were pressing them, and that they made certain borrowings from the Crocker-Anglo Bank to meet these obligations, and the last loan was \$15,000 on June 18th, seven days before the fire, which was applied to an obligation for the purchase of a home by Jensen, and a creditor to whom he owed some \$18,000 was pressing him, and that was the obligation which was paid there. I believe that will be substantially the evidence which

we will offer in this case. Our part comes after the plaintiff's, and we will ask you to reserve your judgment until you have heard the [14] evidence which I think we will be able to produce.

The Court: Members of the Jury, we will take a brief recess at this time.

(Thereupon after the statutory admonition, a brief recess was taken.)

The Court: You may proceed, counsel.

Mr. Hilger: At this time, your Honor, the plaintiff would offer and read in evidence the deposition of Robert S. Goldblatt, taken in Eureka on the 7th day of September, 1957.

Mr. Castro: There is a series of depositions, your Honor, and there are objections which may be discussed. Shall we take them up in advance or as they come up?

The Court: What is this deposition about, counsel?

Mr. Hilger: This deposition, your Honor, is the deposition of Robert Goldblatt, the agent of the Boston Fire Insurance Company, which issued the policy, the agent who delivered it, who extended credit, and who had certain conversation with the plaintiff concerning additional insurance.

The Court: What is the materiality of that? Aren't you gentlemen going to shorten this trial by agreeing that the policy was issued, that it was in effect at the time, and so forth?

Mr. Castro: We have already admitted that, your Honor.

Mr. Hilger: There is an allegation in the cross-

complaint [15] of the issuance of the policy, your Honor, but as to the answer to our complaint there is no admission that it was issued and executed. We will accept the stipulation of counsel that it was issued, but there is matter in this deposition regarding an issue that has been raised by the defendant, a discussion between Mr. Goldblatt and Mr. Jensen shortly before the fire regarding additional insurance, which would tend to relate itself to the issue of incendiarism.

The Court: Is the policy in evidence?

Mr. Hilger: The policy is not in evidence.

The Court: Do you want to put it in? Will you need to?

Mr. Castro: We should, unless there is a dispute about the provisions, your Honor.

The Court: You say you should?

Mr. Castro: It probably should be placed in evidence.

The Court: Has anybody got a copy of the policy?

Mr. Hilger: There is a copy of the policy attached to the deposition of Mr. Goldblatt. If it is a legible copy we will offer that. The one that is attached to mine is not very legible when we get to the endorsements.

The Court: Is there any objection to detaching this from the deposition?

Mr. Castro: No, there is not, your Honor, by the defendant. [16]

Mr. Hilger: No objection.

The Court: Mark the policy of insurance Plaintiff's Exhibit 1.

(The policy referred to was thereupon received in evidence and marked Plaintiff's Exhibit 1.)

The Court: Are there some portions of this deposition you wish to read?

Mr. Hilger: Yes, your Honor, beginning on page 3, line 9, and going down to the conclusion of the direct examination on page 4. Is it your procedure that I take the stand and read it in question and answer form, or should I do it from here?

The Court: Any way that is convenient. You can do it right there if you wish. You might tell the Jury what this deposition is and who the party is.

Mr. Hilger: Robert S. Goldblatt is a resident of Eureka, California. He is an agent for the Boston Fire Insurance Company, among others, and it was he who sold and delivered the policy of insurance here involved to the Eureka Lumber Company. He worked with Walter Warren & Associates Insurance Agency. The Eureka Lumber Company was one of his class or accounts whose insurance he had cared for for some past period years prior to 1956. I propounded the questions that I shall read and Mr. Goldblatt has given the answers after being sworn in the same manner as a witness who would appear here. [17]

(Mr. Hilger read as follows:)

“ROBERT S. GOLDBLATT

a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Q. Subsequent to the issuance of that policy on before the fire of June of 1956 did you discuss further insurance or did you discuss insurance with a representative of the Eureka Lumber Company?

“A. I did.

“Q. When did that discussion take place, as far as you recall?

“A. I can't recall the exact date. It was approximately the first of June.

“Q. Of 1956? A. Of 1956.

“Q. And do you recall with whom that discussion was?

“A. With Dee Jensen or Harold Jensen, however you might refer to him. I knew him only as Dee Jensen.

“Q. Now then insofar as it's related to insurance, what was the gist of that discussion?

“A. Well, I was primarily interested in [18] the fact he had done quite a bit of work on this building and I was concerned, he might be interested in increasing his present insurance.

“Q. Did you propose at that time to Mr. Jensen that he increase his insurance? A. I did.

“Q. So far as you know, did he increase his insurance thereafter? A. He did not.

“Q. What? A. He did not.

“Q. What led you to suggest additional insurance to Mr. Jensen?

(Deposition of Robert S. Goldblatt.)

Mr. Castro: There is an objection to that question, your Honor.

The Court: You make the objection now?

Mr. Castro: I withdraw the objection.

"A. Prior visits to the particular building in question I noticed the remodeling that had been undertaken since the policy had first been written. I figured the value had been increased and that it was part of—it was our job to make these suggestions and see if something could be worked out to bring his insurance more up to value.

"Q. In other words, your testimony would be [19] you felt he was underinsured in that location?"

Mr. Castro: There is an objection to that, your Honor, which we will stand on.

The Court: It is a conclusion of the witness. I think the objection is good, although the witness has already given the facts with respect to it in his previous answer. I will sustain the objection. Is that all you wish to read?

Mr. Hilger: That is all we wish to read from that deposition.

The Court: At this time do you wish to read any of the cross examination or would you prefer to wait for that?

Mr. Castro: May I read it at this time, your Honor?

The Court: All right.

Mr. Castro: This is the cross examination of

(Deposition of Robert S. Goldblatt.)

Mr. Goldblatt at his deposition on September 7th of this year.

“Q. Do you have your records with you?

“A. Yes, sir.

“Q. May I see them?

“A. The entire file?

“Q. If you please. A. Oh, sure.

“Q. Do you have a letter of transmittal on the subject policy? A. As respect what?

“Q. Have you to the Eureka Lumber Company?

“A. A letter of transmittal, I don't quite understand what you mean by that?

“Q. Did you deliver the policy in person to the Eureka Lumber Company or did you mail it?

“A. This particular policy was mailed. I believe there is a letter of transmittal in there, and it probably is attached. I can locate it for you, if it's not attached to there.

“Q. Would you do that?

“A. Yes, surely. Is the letter, isn't it contained in this file here?

“Q. It's the last one here.

“A. Yes. I'll check that and confirm it. Yes, that's the one.

“Q. The policy of Boston Insurance Company which is the subject of this litigation was delivered under date of June 5th, 1956, by mail to the Eureka Lumber Company? A. That's correct.

“Q. And is this a true and correct copy of the letter which transmitted it, the transmittal letter?

“A. That's correct.

(Deposition of Robert S. Goldblatt.)

"Q. May we remove it?

"A. Yes, you sure may." [21]

Mr. Castro: The letter was then marked as an exhibit for identification, and at this time, your Honor, we offer in evidence that particular letter.

The Court: I have the one that was attached to the deposition. Do you wish to put that in evidence?

Mr. Castro: Yes, please.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit B.)

Mr. Castro: May I read Exhibit B. This is the letter referred to as the transmittal letter bearing date June 5th, 1956, addressed to the Eureka Lumber Company:

"June 5, 1956.

"Eureka Lumber Co.
3rd and Commercial Sts.
Eureka, California

"Gentlemen:

"The enclosed policy is a replacement contract for the \$20,000 Stock policy which was cancelled recently by notice.

"We ordered a new contract in lieu of the other policy so that we could have a little more time to pay the premium due thereon.

"There will be an Earned Premium for the time the Fire Insurance was in effect and we shall remit a statement to you shortly on this short term charge.

(Deposition of Robert S. Goldblatt.)

"If there are any questions regarding the [22] enclosed, please do not hesitate to get in touch with us.

"Kindest regards,

"Walter J. Warren & Associates, Inc."

(The reading of the deposition was resumed as follows:)

"Q. Would you tell me on what date the Pennsylvania Fire Insurance Company policy was delivered?

"A. There was, excuse me, an initial policy delivered around the first of January in '54 and that policy was subsequently rewritten."

The Court: I do not see the materiality of this. I have been glancing at it. If there is anything special you want to read, find that.

Mr. Castro: Yes, your Honor. I think the easiest way to do it would be to put it on as part of our case.

The Court: You can reserve the right to put it in as part of your case.

Mr. Castro: Thank you, your Honor.

The Court: Call your next witness.

Mr. Hilger: At this time we would like to read into evidence the deposition of A. J. Franceschi taken in Eureka, California on September 7th, 1957.

The Court: All right, counsel. [23]

Mr. Hilger: The questioning was propounded by myself to A. J. Franceschi:

(Reading.)

(Deposition of A. J. Franceschi.)

The Court: It is not directly responsive, but in view of the opening statement of the defense counsel I think that I will allow it. I will deny the motion to strike. You are putting in some things that may be a little out of order, which may be more in the nature of rebuttal than part of your direct case.

Mr. Hilger: There are certain preliminary items that this deposition will prove, and I thought the more orderly way to do it would be to read it consecutively.

The Court: All right.

“A. That’s right. And they had also—we had loaned them money on various occasions on an unsecured basis which we were always taken [26] care of as agreed.

“Q. Now then, Mr. Franceschi, in connection with the bank account—do you have a signature card concerning the Eureka Lumber Company bank account that was in effect on June 25th, 1956?

“A. Yes.

“Q. Do you have it with you there?

“A. I do, yes.

“Q. May I see it?”

The Court: What is the materiality of all this as to the signature card?

Mr. Hilger: There is an allegation, your Honor, that Harold Dee Jensen had an interest in the business, the bank account and the inventory of the Eureka Lumber Company. We offer it to prove that the bank account was the sole property of

(Deposition of A. J. Franceschi.)

H. M. Jensen and had been since its opening with the Crocker Anglo Bank.

The Court: Are you standing on that count, Mr. Castro? Is that an issue in the case of any consequence?

Mr. Castro: Yes, there is, your Honor, concerning Harold Dee Jensen's interest.

The Court: I assume that has some relationship to the special defense.

Mr. Castro: Yes, your Honor.

The Court: All right, go ahead. [27]

"Now, Mr. Franceschi, that signature card that you have there, is that a part of the bank records?

"A. Yes, it is.

"Q. Is that regularly maintained in the course of the bank's business? "A. Yes, it is.

"Q. Is it prepared at the time the account is placed into effect or opened?

"A. When the account is opened, that's correct.

"Q. That signature card is in your custody as an official of the Crocker Anglo Bank?

"A. Yes, that's right.

"Q. Now then referring to this signature card which we'll ask at this time to be marked as Plaintiff's Exhibit next in order so that we may refer to it——"

At this time we would offer the signature card in evidence as Plaintiff's next exhibit.

The Court: Shall I detach it from the deposition?

(Deposition of A. J. Franceschi.)

Mr. Hilger: By detaching it from the deposition, yes, your Honor.

(The document referred to was thereupon received in evidence and marked Plaintiff's exhibit 2.)

"Mr. Hilger: Now referring to this Plaintiff's [28] Exhibit One, what person was authorized to sign checks on the account at the Eureka Lumber Company?

"A. H. M. Jensen is the only one.

"Q. There were no other authorized signatures?

"A. No sir, not to my knowledge.

"Q. Now, then, Mr. Franceschi, you have stated that in connection with your banking business you have had occasion to loan to Eureka Lumber Company money?

"A. That's right, on several occasions.

"Q. Having reference to the time prior to June 25th of 1956, what was the bank's experience in connection with the liquidation or repayment of those loans?

"A. Always taken care of as agreed.

"Q. Now on the date of June 25th, 1956, did the bank have any outstanding loans to the Eureka Lumber Company?

"A. Yes, we had two loans for a total of ten thousand dollars, neither one of which were due.

"Q. When were those loans negotiated?

"A. March the first of '56, five thousand and June the 18th of '56, five thousand.

"Q. June the 18th of '56 would be one week

(Deposition of A. J. Franceschi.)

prior to June 25th and you had loaned the Eureka [29] Lumber Company five thousand dollars?

“A. That’s right.

“Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?”

Mr. Castro: Objection to that, your Honor, on which we stand.

The Court: I will overrule the objection.

“A. As far as we were concerned, it was good.”

The Court: Do you want to take up your cross examination of this witness now, Mr. Castro, or do you want to reserve it?

Mr. Castro: Not at this time, your Honor. I will reserve it.

Mr. Hilger: At this time, your Honor, to complete the testimony of Mr. Franceschi, a subsequent deposition was taken at which further direct examination was made, which by stipulation could be considered a part of the deposition just read on behalf of the plaintiff. It might require, in view of the deferring of the cross examination, in which a Hess transaction was developed, to which reference is made in the latter portion of this deposition, it might require either the reading of the cross examination or a word of explanation that an additional transaction was developed under cross examination.

The Court: I am not familiar with what you are [30] speaking about. I am not attempting to limit counsel. Proceed in whatever way you want to present your evidence.

(Deposition of A. J. Franceschi.)

Mr. Hilger: It developed in the cross examination that Mr. Jensen had purchased the property upon which the building that burned was situated from a Mrs. Hess, and that there was a deferred balance payable monthly, and it further developed that the Crocker Bank had a record of those payments that had been made up to the time of the fire on that obligation to Mrs. Hess, and it is in connection with that transaction that I would like to continue Mr. Franceschi's testimony and offer in evidence the payment record that is attached to the deposition.

The Court: Attached to the first deposition?

Mr. Hilger: I believe it may have been attached to the second. I know the context appears in the second, although by stipulation it is part of the first.

The Court: There seems to be a bulky document attached here. You might take this. Is this what you have reference to? That is attached to the first deposition.

Mr. Hilger: Yes, that is the document to which I had reference.

The Court: You may offer it in connection with this testimony, whichever way you wish to proceed.

Mr. Hilger: Thank you, your Honor. Referring now to page 8, beginning at line 21 of the deposition of [31] A. J. Franceschi, taken on September 18, 1957, in Eureka.

“Mr. Hilger: At this time I would like to identify for the record and have attached as an exhibit

(Deposition of A. J. Franceschi.)

the analysis of payment on Jensen note receivable, it's entitled that way on the top, and Anna H. Hess," to which Mr. Castro stipulated.

"The Witness: That's note payable, it would be a note payable, wouldn't it?

"Mr. Hilger: It says analysis of payment on Jensen note receivable is the heading of the piece of paper.

"The Witness: Mrs. Hess, yes, I am sorry, it was to her, that's right.

"Mr. Hilger: Now then this copy of the document that I am handing you relates to what transaction?

"A. It's payment made by Hyrum Johnson on his note.

"Q. Hyrum Jensen?

"A. Hyrum Jensen on his note in favor of Anna Hess.

"Q. Is that the note covering the deferred balance on the purchase price of the land that you have previously testified concerning?

"A. Yes, on Third Street between Commercial [32] and Broadway.

"Q. As I understand it, your bank received the collection from Mr. Jensen on behalf of Mrs. Hess as a service to her?

"A. Actually, payments were made to Mrs. Hess and she in turn came over to the bank and we made an endorsement on the note.

"Q. I see.

"A. That's why she signed it, that's her signature.

(Deposition of A. J. Franceschi.)

“Q. That’s the signature of Anna Hess?

“A. Anna Hess.

“Q. Appearing on that copy? “A. Yes.

“Q. That’s a true and correct copy of the payments made by Mr. Jensen?

“A. To Mrs. Hess.

“Q. That relates to the payments received on or about the dates indicated between January of 1954 through June of 1956?

“A. That’s right.

“Q. I refer to the total or rather the final figure in the first column of figures under the heading——”

Mr. Castro: To which we object, that being a later [33] transaction connected with the Pennsylvania Insurance Company dated April, 1957.

The Court: I do not see anything about any insurance company here.

Mr. Castro: No, your Honor. Do you have that pay record there?

The Court: He is referring to an analysis of payments on the Jensen note to Mrs. Anna Hess.

Mr. Castro: The last payment which was made is what the series of questions is referring to.

The Court: It is not clear to me.

Mr. Hilger: It appears on the payment schedule, your Honor, either as a total or a payment, but in order to make sure there is no misunderstanding what that figure is which appears on that schedule, I ask to clarify it by these questions.

(Deposition of A. J. Franceschi.)

The Court: Is \$246.59 the total amount of the payments?

Mr. Hilger: That is what this line of questioning is designed to show, exactly what it is. It develops it is not.

Mr. Castro: That refers to a payment in the next year, does it not, your Honor?

The Court: It says 1956, and on June 19th it shows \$413.31. I do not understand what you are talking about. I may be a little obtuse this morning.

Mr. Hilger: Perhaps if I read the questions and [34] answers it would develop what that item covers.

The Court: Go ahead and read it.

Mr. Hilger: Was I at line 3 on page 10?

“Q. I refer to the total or rather the final figure in the first column of figures under the heading ‘amount of payment’, and the figure being ten thousand two hundred and forty-six dollars and fifty-nine cents. What does that figure represent?

“A. That’s the total payment made at that time.

“Q. The total of payments made during an interval—

“A. (Int’g) No, that was the total payment made on that particular date of which five thousand four hundred and seventy-three thirty-four was credited to interest and the balance of four thousand seven seventy-three twenty-five was applied on principal and, as I recall, I think that was the settlement of the fire loss.

(Deposition of A. J. Franceschi.)

“Q. That’s on the building? “A. Right.

“Q. The figures above that would represent the monthly payments made by Mr. Jensen up to June, 1956?

“A. That’s correct, it was an odd note, had called for payment of two hundred and fifty dollars [35] for so many months and then five hundred dollars for the balance.

“Q. Is that how it was? “A. Yes.”

At this time we will offer that payment schedule in evidence as Plaintiff’s next in order.

The Court: I will detach it.

(The document referred to was thereupon received in evidence and marked Plaintiff’s Exhibit 3.)

The Court: I understand now what you are trying to get at. The last total item is not total payments but was a distribution of the amount which the witness said was received from the fire loss on the building.

Mr. Hilger: That is correct; additional payments, not a total. At this time we will call Mr. Hyrum Jensen.

HYRUM JENSEN

the Plaintiff herein, was called as a witness on his own behalf, and being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Hilger): Will you please state your name to the Court and Jury?

(Testimony of Hyrum Jensen.)

A. I am just a little bit hard of hearing.

Q. Will you please state your name to the Court and Jury? A. My name is Hyrum Jensen.

Mr. Hilger: At this time we offer into evidence, [36] your Honor, the exemplified copy of the certificate of doing business under a fictitious name, and the affidavit of publication thereof, duly exemplified by the County Clerk and the Superior Court Judge of the County of Humboldt.

Mr. Castro: I object on the ground it is incompetent, irrelevant and immaterial since it is dated October 31, 1956.

The Court: What was the date of the fire?

Mr. Castro: June 25th, 1956.

Mr. Hilger: The date of the filing of the action was December 5th, 1956, after the effective date.

The Court: I think the objection goes to the weight of this document, not to its admissibility. Admitted.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 4.)

Q. (By Mr. Hilger): Where do you reside, Mr. Jensen?

A. 2434 E Street, Eureka, California.

Q. How long have you resided in Eureka?

A. About 12 years.

Q. What is your business or occupation?

A. I beg your pardon. I didn't hear that.

Q. I am sorry.

The Court: Get up closer.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Hilger): What is your business or occupation?

A. I own the Eureka Lumber Company, retail and wholesale lumber. [37]

Q. How long have you been engaged in that business?

A. I think it was in early 1954; the latter part of 1953 or 1954, I forget just which it was.

Q. You acquired it?

A. I bought it, yes.

Q. Prior to that time what business had you been in?

A. I owned a little sawmill that I had leased to my son Harold Dee Jensen.

Q. Your son Harold Dee Jensen died July 12th last past? A. Yes.

Q. Who owned the Eureka Lumber Company, Mr. Jensen? A. I do.

Q. Referring to the period of its acquisition in late 1953 to the present time has anyone other than yourself owned any interest of any sort or character in the Eureka Lumber Company?

A. No, no one.

Q. What was the nature of your business in June, 1956, and prior thereto?

A. Well, we were retailing and wholesaling lumber. We were remanufacturing in the yard and also in the main building. We had a bunch of dry molding, door casing, baseboards and so on, that we had inquiries for some 1x1's clear, kiln-dried, so we

(Testimony of Hyrum Jensen.)

were checking the amount of lumber that we had and we were going to cut it into 1x1's.

Q. That was the ordinary course of your business to—— [38]

A. Yes, it was remanufacturing.

Q. And selling? A. And selling.

Q. Where was that business conducted on June 25th, 1956, and prior thereto?

A. That was Third & Commercial, between Commercial and Broadway.

Q. In Eureka? A. In Eureka.

Q. There is on the board a plat or an outline—a floor plan it would be better described—the building. Will you look that over, Mr. Jensen, and see if that is a fairly accurate exposition—step up there and look it over, if you will, the locations, footages, and see if that is an accurate floor plan of your building before the fire?

A. Yes, I think that is fairly close. This back here——

Q. You are referring now to what area?

A. I had better wait until you ask me a question, I guess.

Q. Where was that building situated on the lot that it occupied?

A. It was on the east side and south. It covered practically a block, that is, up to the alley.

Q. The east side would be Commercial Street?

A. Yes, it would.

Q. Just across the sidewalk area? [39]

A. Yes, on this side would be Commercial.

(Testimony of Hyrum Jensen.)

Q. On the south side would be Third Street?

A. That is right. This is Third Street here.

Q. Behind it, to the north side, what was located there?

A. There was a railroad spur that ran up along here, and the Mercer Frazer Cement Works and Ready Mix was right next to it.

Q. On the other side of the railroad track?

A. Yes, on the other side of the railroad track. There was a small alleyway here, I imagine, 20 feet from the building.

Q. What was to the west of the building?

A. In here——

Q. No, I mean outside the building, Mr. Jensen. What was adjacent to the building on the west side?

A. That was lumber coming in and going to be remanufactured, up-graded and graded.

Q. That was your lumber? A. Yes, it was.

Q. Was that a vacant or, rather, unimproved lot with no buildings on it?

A. No buildings on it.

Q. How large was that area to the west that had no buildings on it?

A. I imagine it was about a hundred and forty-eight feet, I believe, to the street and then Broadway divided, and we also [40] had another yard across the street from that on the railroad property.

Q. The complete block, then, between Commercial and Broadway was occupied by these premises, the building and the unimproved area?

(Testimony of Hyrum Jensen.)

A. Yes.

Q. And in addition you had a yard on the west side of Broadway? A. Yes, we did.

Q. Speaking now of the area outside the building, Mr. Jensen, what was stored there in June of 1956? A. Outside the building?

Q. Yes, on the open area.

A. There was lumber, all types of lumber. There was mostly 2x4's and 1x6's, and there was quite a bunch of kiln-dried redwood.

Q. Did you likewise have lumber stored over on the west side of Broadway?

A. Yes, we did, and we also had lumber stored across Third Street in a vacant lot there.

Q. Was any of the lumber stored outside the building, any of this lumber that you have referred to that was outside the building——

A. All of it was outside.

Q. All of this outside the building—— [41]

A. Yes.

Q. Was any of that damaged or affected by the fire of June 25th, 1956?

A. No, it was not. The fire stayed inside the building pretty well.

The Court: Why don't you have him sit down?

Mr. Hilger: Yes.

Q. Did you in the course of your business, Mr. Jensen, handle any merchandise other than lumber or molding? A. Yes, we did.

Q. What products in general did you carry in

(Testimony of Hyrum Jensen.)

the ordinary course of your business other than lumber?

A. A complete line of builders' supplies, sheet-rock, doors, windows, molding, baseboards, paint, turpentine, roofing material, shingles—a complete line of builders' supplies—hardware, nails.

Q. On June 25th, 1956, did you maintain an inventory of such merchandise?

A. Well, that was part of my son Harold Dee Jensen.

Q. What I mean to say is did you physically possess an inventory? I am not talking about accounts now.

A. Yes, we did. We had a large inventory.

Q. Let us consider some of that inventory. How often were you around these premises prior to the fire and up to the time of the fire, Mr. Jensen? [42]

A. I stayed in the open yard mostly. I took care of the remanufacturing and transferring of lumber, loading in and so on on the outside.

Q. That would be the wholesale sales?

A. That would be wholesale mostly and some retail.

Q. Did you go into the warehouse or the building portion upon occasion?

A. Yes, I did, quite often.

Q. How often would you go in just prior to the fire?
A. Well, four or five times a day.

Q. In connection with your conduct of the business and your visit there to the premises several

(Testimony of Hyrum Jensen.)

times daily did you have any familiarity or knowledge about the inventory on June 25th, 1956?

A. Yes, I did.

Q. Did you have any knowledge of where the various items making up that inventory were stored in the building?

A. We had a large amount of molding——

The Court: First he wants to know whether you know, and then he will ask you another question.

A. I beg your pardon. Yes, we did.

Q. (By Mr. Hilger): Referring specifically to an item of molding that appears——

The Court: Before you go into the details, perhaps we might take the luncheon recess at this time. [43] Members of the Jury, we will resume the trial at 2:00 o'clock. Will you please come back at that time. [44]

Afternoon Session, 2:00 O'Clock P.M.

HYRUM JENSEN

the Plaintiff herein, having been previously duly sworn, resumed the witness stand and testified further as follows:

Q. (By Mr. Hilger): Mr. Jensen, at the close of the morning session you had completed your testimony to the effect that you had observed the inventory at and shortly before the fire, the inventory both inside and outside the building. Did your firm carry in inventory in June, 1956, any redwood

(Testimony of Hyrum Jensen.)

moldings and casing items? A. Yes, we did.

Q. Will you explain to us what molding and casing inventory would consist of? Describe it.

A. Well, the molding would run about, after it was reconditioned and resawed, about \$280 a thousand.

Q. I hadn't reference to the price at this time, Mr. Jensen. Do you have trouble hearing me?

A. Yes, I do. That is better. I am sorry.

Q. Would you describe what a piece of molding or window casing is?

A. Oh, yes. It is a piece of clear lumber. It runs from two inches wide up until eight, and it is kiln-dried, and it is made into different patterns for door casings, baseboards, quarter round, and so on. I think everybody is familiar with quarter rounds, baseboards, window sills, and so on. [45]

Q. How is an item like that stored when it is kept in inventory?

A. Well, half inch is counted inch in width. It measures in board feet. Everything that is a half inch and up—in fact, a quarter of an inch—measures a square inch in board feet, and the biggest part of molding runs a half inch to a little more, that is, baseboards, window sills, and so on, after it has been surfaced and put into a pattern.

The Court: The lawyer was asking you how do you pile it.

The Witness: I beg your pardon. We pile it in units and strap it tight, or put sticks between in order to keep the moisture out of it. We call them strippers.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Hilger): How high were these piles in your particular instance just prior to the fire?

A. Well, some of them was——

Mr. Castro: May we find out which piles we are talking about, your Honor, whether it was inside or outside the building?

Mr. Hilger: All my questions hereafter will be directed to inventory inside the building that was affected by the fire. Perhaps first of all we had better find out just where this molding material was stored in the building.

Q. Would you step there to the diagram and point to where that was stored? [46]

A. Yes. We had a portable sawmill about right in here, I would say, and the molding was stored all the way from here back to here and on back here, and in here there was another tier. These moldings would run from four to eight feet in length.

The Court: I don't think the witness understands your question. You said you were referring to what was inside the building, didn't you?

Mr. Hilger: That is correct, and this is the place within the building, your Honor, that it was stored.

The Court: Very well.

A. We had a row all the way from the front back here between the sawmill sitting here and the partition in this building. It ran all the way back here. Then we had another row piled up in here. And here were some posts in the center here to

(Testimony of Hyrum Jensen.)

hold the roof. We had this end piled full here, back of the door, and between here and there we had some piled up, and then there was a large pile right in here, and then down through here. We had this piled up pretty well about into there, and then we had at least a small place in here for a truck, and we cleared some out from this space in here and put back on the top of this, which was laying all loose, the ends sticking up and down in every direction. It was all dried and small, anywhere from 1x1's to 1x6's. And this was all kiln-dried molding. And back up in this extreme corner here we had fence material instead of molding. I beg your pardon on that. 1x6's and 1x8's, up [47] in this part here and down to here. The molding up in this part, in this part, and down through here (indicating on diagram).

Q. With reference to the southwest corner there where you indicate you cleared for a truck, had there been molding there prior to the time that truck moved in? A. Yes, sir.

Q. What had been done with the molding when that truck moved in?

A. We piled it on top of these piles back of this portable sawmill we had in here and over in this direction here. They were quite high when they were piled. They were not piled very neat, so it looked like it was more than it was, because it was piled loose.

Q. It was not tightly bound?

A. Not what we had taken out of this space here

(Testimony of Hyrum Jensen.)

and laying loose, but the other was mostly tightly bound.

Q. Did you perform any manufacturing function on that molding in connection with its manufacture?

A. Yes, we did. We would buy a cheaper grade of lumber, which was somewhat mismanufactured when we got it, and we would run it through our machines and cut off the bad places, a tear on the side or something where it wasn't cut perfect—we would run it through our machines and trim it all up like it should be. That was the kind of business we operated, so we could raise our price on good merchandise. [48]

Q. You would take mismanufactured material and make it into a properly manufactured product, was that it?

A. Yes, it was. We had quite a stock of this dried molding on hand and had it for quite awhile, and we had a couple of inquiries about—

Q. I will get into your quantity of it. But I just wanted you to describe the material, Mr. Jensen, where it was stored and the manner it was stored. The description you have given of the location of this molding and the manner in which it was stacked, was that a description of its condition just prior to the fire?

A. Yes, it was. About two weeks or ten days prior to the fire we had an inquiry from two different fellows, what we could furnish 1x1's for.

Q. At that time did you make any estimate or

(Testimony of Hyrum Jensen.)

did anyone in your organization make an estimate of the quantity of inventory that you had on hand?

A. Yes, we did. My son Dee called me over. He was the one who had the order, the inquiries.

Q. Do you recall who that inquiry was from?

A. Yes, I think one was from Mr. Wallace in Eureka, and the other I think was from a Russ Sharp through Baugh Lumber Company, molding company.

Q. Where would that be located?

A. That was in Los Angeles. [49]

Q. What did that inquiry call for? A. 1x1.

Mr. Castro: Objected to, your Honor, on the ground nobody else was there at that time. There was nobody there at that time, your Honor.

The Court: Are you making some objection?

Mr. Castro: Yes, your Honor. I think that—I won't do it. Thank you, your Honor. May I get the name of that other party he said he was talking to?

Mr. Hilger: Russ Sharp I believe is one of them.

The Witness: Wallace was a lumber broker.

Q. (By Mr. Hilger): What quantity of material did this inquiry call for to be delivered, Mr. Jensen?

A. I believe that one was for three carloads and I think the other was——

Mr. Castro: I will object to this as hearsay.

The Witness: Around about five carloads.

The Court: Just a moment.

The Witness: I beg your pardon.

(Testimony of Hyrum Jensen.)

Mr. Castro: I object to this as hearsay, your Honor.

The Court: Is the witness referring to something that was told him by his son?

Mr. Castro: I believe the witness is outlining a procedure he went through and the reason for it in estimating the quantity of molding. [50]

The Court: Of course, it would not be proper evidence of the fact of the inquiry, but I take it what you are using this for is merely a preliminary to show some action on the part of the plaintiff with respect to ascertaining quantity?

Mr. Hilger: That is correct.

The Court: If that is the purpose of it, I will overrule the objection.

Q. (By Mr. Hilger): Would you state for us, if you recall, the quantity that was called for to be delivered in these inquiries that you were investigating?

A. I think one was around three carloads and the other was about five. We thought we had better go out and check this stock to see if we could make these one of the——

The Court: Can't you move this along a little bit? Ask him what he did in connection with it.

Q. (By Mr. Hilger): In connection with that investigation what did you do toward ascertaining the existence or non-existence of that quantity of merchandise, Mr. Jensen?

A. We went over and estimated how much we could get out of it.

(Testimony of Hyrum Jensen.)

Q. You mean you looked at it?

A. Yes, we did.

Q. How long have you been in the lumber business, Mr. Jensen?

A. Ever since I was about 16 years old, off and on.

Q. In connection with your experience in the lumber business [51] have you been called upon to estimate the quantity of lumber in a given volume? A. Yes, I have, many times.

Q. Have you been called upon to classify and grade lumber by viewing and inspecting it in accordance with the standard grades?

A. Yes, I have. May I relate an incident—

The Court: No, you just answer the lawyer's questions. If you talk too much yourself, you will get yourself into trouble. Just answer his questions.

Q. (By Mr. Hilger): Mr. Jensen, after you looked at this lumber, gauged it and estimated it, did you form an opinion as to how much was there?

A. Yes, we did.

Q. Did you? A. I did.

Q. In your opinion how much was there?

A. Well, we figured at that time there was around 65,000 of the dry and about 35,000 of the green lumber in the finished material.

Q. How long prior to the fire was that, Mr. Jensen?

A. A week or ten days, I should say.

Q. After that estimate had been made, was there

(Testimony of Hyrum Jensen.)

any material change in size, description or character of that inventory before the fire? [52]

A. I believe that we put some more stock in there, if I remember right, from out of the yard that was dry. We put it in there in order to keep it out of the wet, if it would rain.

Q. Was that a material amount or a small amount?

A. Well, it was a rather small amount, maybe two or three thousand feet. We put it right in the doorway.

Q. Had there been any material amounts of that inventory removed after you made that estimate? A. Very little, if any.

Q. You have been in the lumber business for 13 years in connection with that background and experience. Do you know the value of lumber and lumber products in the Humboldt and Eureka area in 1956? A. I did, yes.

Q. Based upon that experience and your knowledge of your business have you an opinion as to the value of kiln-dried molding products in June of 1956? A. Yes.

Q. What is your opinion of the value of such products in good condition?

A. After we had remanufactured and put them in shape it ran all the way from 200 to 240, 280 a thousand.

Q. Do you have an opinion as to an average market value for the entire lot across the board?

A. Yes, that would have been very cheap. [53]

(Testimony of Hyrum Jensen.)

Most molding and stuff like that sold by the lineal foot.

Q. Would that be a greater value?

A. It would be greater. Sometimes it runs from four up as high as 12c a lineal foot.

Q. In terms of board feet you stated the value would run from \$200 to \$280 a thousand board feet?

A. Yes.

Q. Depending, I presume, on which type of product?

A. That is right.

Q. Having in mind the makeup of your inventory of molding products at the time of the fire, have you an opinion as to the average per thousand foot value of that molding stock in June, 1956, at the start of the fire?

A. I would say \$280 a thousand.

Q. \$280 a thousand?

A. Yes.

Q. Have you likewise in knowledge regarding the value of this fencing material in June, 1956, in Humboldt County?

A. Yes, I have.

Q. What in your opinion is the value of the fencing material at the start of the fire in June of 1956?

A. It would run about \$80 a thousand. These prices were wholesale prices.

Q. That would be the price that a wholesaler would pay, is that correct? [54]

A. Yes.

Q. What happened to the molding material in the fire? Was it affected by the fire at all?

A. Yes, it was all destroyed.

Q. Was there any material portion of it left?

(Testimony of Hyrum Jensen.)

A. There was a small pile of fence material left in the north side of the building.

Q. Will you point that out for us?

A. That would be right up in here (indicating). It hadn't burned. It was a little bit wet. I think they got the hose on it pretty much right at the opening there. It hadn't burned, although it was ruined, but there were still piles where you could see it was lying, but the dried molding and all of that was 99% burned.

Q. Was there any possibility of recovering anything of value out of the ashes?

A. No, there was not.

Mr. Hilger: At this time, your Honor, in order to speed things along, there is attached to the deposition of H. B. Whittet a photostatic copy of a proof of loss filed in this matter, and I'm wondering at this time if we can have that.

The Court: Which deposition is that?

Mr. Hilger: I believe it is H. B. Whittet.

The Court: Do you want to remove that?

Mr. Hilger: If you will, your Honor, and we will [55] offer it as our next exhibit in order.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 5.)

Q. (By Mr. Hilger): After this fire occurred, and in connection with your negotiations with the insurance company, you caused to be prepared a listing of the items lost or damaged in the fire, did you not, Mr. Jensen? A. Yes, I did.

(Testimony of Hyrum Jensen.)

Q. On this Exhibit Number 5 that has just been introduced, a proof of loss, that is a true photostatic copy of the list which you caused to be prepared and submitted to the insurance company over your signature? A. That is right.

Q. The item that we have been discussing here, the redwood molding and window casings, appears as the first item in Exhibit B there, does it not?

A. Yes, it does.

Q. And the fence boards that we have mentioned is the second item on Exhibit B? A. Yes.

Q. Preceding Exhibit B there was an Exhibit A, consisting of five pages of listed materials and values set opposite them. I would like to inquire as to a few of the items on there, Mr. Jensen. A Porter cable electric chain saw. Do you know anything about that item? [56] A. Yes, I do.

Q. Was that a part of your inventory at the time of the fire?

A. Yes, that was part of our inventory.

Q. Do you know the value of that piece of inventory at the start of the fire?

A. The electric chain saw?

Q. Yes.

A. I think it was about \$125, the wholesale price, something like that. We had a gas power saw that was worth more than that. I don't know whether they listed that in as stock or not, or some of our equipment.

Q. That is not listed, Mr. Jensen. A. No.

Q. There also appears on page 5 of the exhibit

(Testimony of Hyrum Jensen.)

there a set of planer heads and planer knives. What would that consist of?

A. That goes on a high-speed planer. They sit on each side of the board, and they run about \$6 or \$700 a set, and we had ordered these for a customer of ours.

Q. Do you know the value of this set of knives and planer heads at the start of the fire in 1956?

A. I think they were around \$600. I am not sure of that but around that.

Q. I note you placed \$590 in your proof of loss.

A. That is pretty close. [57]

Q. Also appearing on page 5 of the proof of loss is 25 horsepower electric motor and a 50 horsepower electric motor. Are you familiar with those two items? A. Yes, I am.

Q. What was their condition at the start of the fire or just prior to the fire, Mr. Jensen?

A. They were in running condition. They was off a planer, and we had no use for them on this planer. We was going to operate it with a diesel motor, so we put them in for sale.

Q. They were part of your inventory at the time of the fire? A. Yes, they were.

Q. They were in running condition?

A. Yes, they were, very good.

Q. Have you seen them after the fire?

A. Yes.

Q. What was their condition immediately after the fire?

A. They were completely burned, ruined. I

(Testimony of Hyrum Jensen.)

called in an electrician and asked him if they were any good, and he said they were no good.

Mr. Castro: I object to this as hearsay, your Honor.

The Court: That part about his calling in an electrician and what the electrician said may go out as hearsay.

Q. (By Mr. Hilger): You did personally, [58] however, observe these motors yourself?

A. That is right. They were melted.

Q. There also appears on page 5 of the proof of loss a Miller electric welder with leads. Are you familiar with that piece of equipment?

A. Yes, sir, I am.

Q. Do you know from whom you obtained that?

A. From McGaraghan Supply House.

Q. Do you know what its cost was?

A. I think around \$800, maybe a little bit less. We bought it at a wholesale figure.

Mr. Hilger: Does the Court have attached to the deposition of Mark Evans an invoice?

The Court: Yes.

Mr. Hilger: May I detach that, please, your Honor? You have seen this, Mr. Castro?

Mr. Castro: Yes.

Q. (By Mr. Hilger): I show you an invoice from the McGaraghan Supply Company covering a Miller welder and showing a total cost of \$759.82. Would you refer to that and tell me whether or not the transaction reflected on that document cov-

(Testimony of Hyrum Jensen.)

ers the same welder that is shown here in your proof of loss? A. Yes, it is.

Q. Does that refresh your recollection as to the cost of it, Mr. Jensen? [59] A. Yes, it does.

Q. Is that \$759.82 the proper cost?

A. I would say that is right.

Mr. Hilger: We will offer this as Plaintiff's next exhibit.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 6.)

Q. (By Mr. Hilger): What condition was that welder in at the start of the fire, Mr. Jensen?

A. It was new. It had just been purchased.

Q. It had just been uncrated? What was its condition after the fire? A. It was molded.

Q. Did it have any value at all?

A. If it was water, it would have run all over the floor.

Q. On page 5 of your proof of loss is a Babs hardware portable sawmill with a Cummings diesel engine. Are you familiar with that item?

A. Yes, I am.

Q. Where was that located at the time of the fire?

A. That was located right about here, over like that. We had just built it.

Q. Of what did that sawmill consist?

A. It had a 275 Cummings diesel.

Q. When you say "275 Cummings diesel," do you refer to the horsepower rating? [60]

(Testimony of Hyrum Jensen.)

A. Yes, 275 horsepower rating.

Q. That was the power unit? A. Yes.

Q. What else was on it?

A. Well, it was a complete portable sawmill with saws, belt, carriage, feed works.

Q. By carriage what do you mean?

A. That would run the log up and down to be sawed by the saw.

Q. What else was on it?

A. Well, there was a feed works.

Q. What is a feed works?

A. Feed works is a device that you push forward to make the log go through the saw, and when you are through cutting that board off, it pulls your saw back. There is a ratchet you pull over another inch or two inches to catch your next board, and you run that through with the feed works.

Q. It is the motive power behind the carriage?

A. Yes.

Q. Had that sawmill been sold at the time of the fire? A. Yes, it had.

Q. Do you know to whom?

A. We sold it to Dayton Murray. They are the G.M.C. dealer there. [61]

Q. Would that be the Dayton Motor Truck Sales? A. Yes, it was.

Q. Do you recall approximately when it was sold?

A. Not exactly. It was sold several months before the fire.

(Testimony of Hyrum Jensen.)

Q. Had Dayton Motor Truck Sales taken delivery of that item at the time of the fire?

A. No, they had not. It was still in the building.

Q. What was the sale price of that unit?

A. \$7500.

Q. Did you collect it all or any part of that sale price at the time of the fire?

A. We bought a truck and we turned in \$4,000 on the sawmill credit on the truck, and they owed us \$3500 balance.

Q. Was Dayton Murray Truck Sales under any obligation to retire that \$3500?

A. Yes, they were.

Q. And that was in addition to the \$4,000 that you had been allowed when you acquired the truck?

Q. Yes.

Q. What kind of truck was that you acquired?

A. G.M.C.

Q. Do you recall approximately the total price of it?

A. I think it was around \$19,000. I am not sure about that.

Q. Did you receive an invoice from Dayton Murray Truck Sales covering your purchase of the truck and your sale of the sawmill to them? [62]

A. Yes, I did.

Q. Do you know where the original of that invoice is now?

A. Why, it must have been burned in the fire.

Q. You don't know where it is?

A. Not personally I don't. My son Dee kept

(Testimony of Hyrum Jensen.)

care of all the records of all the stuff. That was under his office.

Q. You have not, at any rate, seen the invoice, or have you, since the fire, the original invoice covering that truck? A. I don't think so, no.

Q. Without going into detail covering the other items on the first five pages of the exhibit there that are listed and priced, would you look this over and indicate to us whether or not that is a correct and reasonably accurate statement of the type of inventory that you had stored in this building at the time of the fire? A. It is.

Q. Going into the storage of molding and fence board in the western approximately one-half of the building, would you step up to the board now, and perhaps you could use the pointer to assist you, Mr. Jensen, and let us begin with the northwest room that is shown there in the enclosed area to the east of the middle partition. Tell us in general what was stored in that location?

A. We sometimes had—— [63]

The Court: He wants to know at the time of the fire what was stored there.

Q. (By Mr. Hilger): Just prior to the fire, Mr. Jensen.

A. Okay. Well, we had furniture, we had a car-load of sheetrock, we had roofing, shingles, and we had a Kaiser automobile up in here. There were two open doors right there where we sometimes run it in, because we had an acetylene welder and dif-

(Testimony of Hyrum Jensen.)

ferent equipment was in this. Just used it to run around the yard with.

Q. Looking at the northeast room——

A. This one (indicating).

Q. That room right there—what in general was stored in there at and just prior to the time of the fire?

A. We had this filled with doors, hardwood doors, maple, ash, mahogany, bathtubs, bath fixtures, toilet bowls, windows, mirrors, wash basins, sinks, kitchen cabinets and like that.

Q. Referring to the southwest room, just to the east of the middle partition there, what was the character of the merchandise stored in that location, if any?

A. We had plywood, shingles, asbestos shingles, moldings—not moldings—I beg your pardon. I forgot something. Could I go back to that?

Q. The northeast room? Surely.

A. Yes, we had a whole bunch of pine molding boards and quarter round that we had ordered specially with the order we [64] had taken for these doors from a Mrs. Woods in Fortuna. Fourteen houses were ordered, and they were all stacked up in there at the time of the fire.

Q. And Mrs. Woods was a subdivider?

A. Yes, she was a contractor. This molding was in there, and this room was filled with shingles, asbestos siding—I don't know how much of that—not very much, asphalt roofing and shingles. Asphalt shingles, and there was a bunch of new truck

(Testimony of Hyrum Jensen.)

tires in this part here and an acetylene welding outfit, an electric welding outfit, and probably 50 or 70 truck filters for oil of a big type, and there was a lot of different storage in this front end that we had stored—welders' tools, electric air pump.

Q. You mean non-inventory type items?

A. These down here was non-inventory type.

Q. Move over, if you will, to the southeast room and describe just how that was laid out. Start at the south end. What was in that area where your pointer now is?

A. Right here we had a door entrance. It went up about four steps to our office, which is right about in here. That was our bookkeeper's office, and for a short time our son Dee had his office over in here. Here was where we had a closet, a clothes closet, and back of here was our store, in which we had a complete line of doors, linoleum and all types of floor covering. [65]

Q. Was that more or less your display room?

A. That was our display room. We had doors, windows, different types, and all such—a complete line of building supplies was in there.

Q. You went upon these premises after the fire, did you not? A. Yes, I did.

Q. Preliminarily, however, before we get into that, I will go back for a moment to the inventory and merchandise you described in those four rooms. In general are you familiar with its merchantability and condition just prior to and at the start of the fire?

(Testimony of Hyrum Jensen.)

A. Yes, it was all salable merchandise.

Q. Regularly stocked merchandise?

A. Yes, it was.

Q. In condition to be marketed in the ordinary course of your business? A. Yes.

Q. Did you go on the premises after the fire?

A. Yes, I did.

Q. Did you notice the condition of the inventory of those four rooms after the fire? A. I did.

Q. Will you describe it to us?

A. They were destroyed with the fire except the doors—may I step over here? [66]

Q. Surely.

A. This back part here, it hadn't burned. Just completely water soaked from top to bottom. Of course, practically all the windows and stuff like that were broken. Very few of them had not broken, and all the bathtubs, sinks, and stuff like that had been hot, and when they poured water on them, they had chipped. But the fire didn't get in there, only water, in this part here (indicating).

Q. Was there any smoke damage in that area?

A. Yes, it was all damaged very heavily with smoke and water.

Q. What effect did the water have on the doors, Mr. Jensen?

A. Well, it naturally warped them and soaked them all up.

Q. What type of doors were those?

A. They were outside doors, partition doors, big doors and smaller doors.

(Testimony of Hyrum Jensen.)

Q. From the point of view of their construction were they the type of doors that are referred to as hollow-core doors?

A. Some of them were, yes.

Q. That is the type where the two outside surfaces are pasted onto a frame?

A. Yes, sort of plywood.

Q. What had happened to those doors in connection with the water?

A. Just as soon as the water hit them the glue [67] give way and they just started to peel up on their ends, and they all turned black.

Q. Did you cause pictures to be made of this building and its interior after the fire?

A. Yes, I did.

Q. I am going to hand you this picture and ask you if that accurately and fairly depicts the appearance of that portion of the building after the fire?

A. Yes, it does.

Q. That is which part of the building, Mr. Jensen?

A. That is the front facing Third Street on the south.

Q. The portion down here shown on the south side?

A. That would be here (indicating on diagram).

Mr. Hilger: I will offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 7.)

(Testimony of Hyrum Jensen.)

Mr. Hilger: May the Jury see these at this time, your Honor?

The Court: If you wish. Are they all the same or are these different pictures?

Mr. Hilger: Different pictures.

The Court: The south side of the building?

Mr. Hilger: No, the various parts of the building. I will have the witness identify them. [68]

The Court: The exhibit you had marked as Number 7, that was one photo of the south side?

Mr. Hilger: One photo of the south side exterior.

(Plaintiff's Exhibit 7 was passed to the Jury, as were also the subsequent exhibits introduced.)

Q. (By Mr. Hilger): I show you another photograph and ask you what that depicts, Mr. Jensen?

A. That is the north end of the building. In this part here is shown where our molding was stored.

Q. This was taken from the outside of the building the photographer looking south? A. Yes.

Q. And photographing the north exterior of the building? A. That is right.

Q. You pointed to which portion as the portion in which the moldings and other items were stored?

A. This; that would be the west side.

Q. Or the right-hand side? A. Yes.

Mr. Hilger: I will offer this as Plaintiff's next in order.

(The picture referred to was thereupon re-

(Testimony of Hyrum Jensen.)

ceived in evidence and marked Plaintiff's Exhibit 8.)

Q. (By Mr. Hilger): Mr. Jensen, here is another picture. Will you tell us what that shows?

A. That was the interior taken from the south looking north.

Q. That would be taken in here by where the sawmill set? A. Yes.

Q. And would be looking out towards the north-west? A. That is right.

Q. Between where the photographer was standing and the other end of the building and the wall, the framework, which you can see there on the left-hand side of the picture, what had been stored in that area?

A. That would be where our molding and fencing material would be.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 9.)

Mr. Castro: Counsel, did you state when those pictures were taken?

Mr. Hilger: No, I did not.

Q. (By the Court): When were these pictures taken?

A. Shortly after the fire.

Q. What do you mean by that? The next day?

A. I imagine it was a week or such matter.

Q. About a week after the fire?

A. I think it was.

Mr. Hilger: If I can refresh the witness' recol-

(Testimony of Hyrum Jensen.)

lection, these were taken under my direction and it was somewhat later than that, some few months after the fire. But the witness has indicated, and it is my information and the personal observation, that the situation there had not changed during that period. [70]

Mr. Castro: Will you tell us when it was that they were taken?

Mr. Hilger: I would have to refer to my records.

The Witness: There were so many pictures.

Mr. Hilger: It would have been during the fall perhaps, Mr. Castro. They were printed in Portland about three weeks ago from transparencies I have in my file.

Q. I show you another picture, Mr. Jensen, and ask you if you can identify that for us?

A. Yes, that is our upstairs office.

Q. We have not discussed your upstairs yet, Mr. Jensen. We have looked at a floor plan. That would be a floor plan of the ground floor?

A. No, it was up on——

Q. That drawing on the board is the downstairs floor? A. That is right.

Q. Now, there was an upstairs?

A. Yes, there was.

Q. And over what part of the building was the upstairs?

A. That was over all of this portion from here to here (indicating).

Q. By that you are referring to the southeast corner of the building?

(Testimony of Hyrum Jensen.)

A. Yes. And this would be our stairway here. It went up through here. We had a building, a little hallway. It had a [71] door here for one office, a door here for another, and a door back here and, by the way, this had an upstairs over this part here, and also this part here. Now, we are talking about the upstairs, where we had merchandise stored up there also. All of this was two stories in here.

Q. What type and character of merchandise was stored up there?

A. We had plywood and masonite and other types of salable merchandise up there.

Q. Where was the office space upstairs?

A. The office space would be, I think, from here back about to here. That would be one office. And then another office here and one back here.

Q. What type of office work was performed upstairs?

A. That was where our bookkeeper worked in handling invoices and withholding taxes and time and so on was kept upstairs.

Q. Various of the records?

A. Yes, all of the records.

Q. Were any of the office functions such as billing, correspondence and that sort of thing done upstairs?

A. That was performed in the upper office.

Q. This picture you just looked at, is that an accurate picture of the upper office?

A. That is one of them, yes.

(Testimony of Hyrum Jensen.)

Q. Is that the office wherein the records and files upstairs were kept? [72] A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Q. (By Mr. Hilger): Here is another picture, Mr. Jensen. Can you tell us what that shows?

A. That is on the inside showing where our sawmill was. You can see part of the big diesel motor, the Cummings that was there. That was one of the biggest type of portable engines that they built.

Q. As you look out beyond that sawmill you see a wall. That would be the west wall of the building? A. Yes, that would be the west.

Q. Between the sawmill and the west wall what would have been stored?

A. That was where some of our molding and fence material was stored.

Mr. Hilger: I will offer this as our exhibit next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 11.)

Q. (By Mr. Hilger): Mr. Jensen, I show you another picture and ask you if you can identify that for us? [73]

A. Part of that was on our west side where we

(Testimony of Hyrum Jensen.)

had our molding stored, and there were some shingles, I think asphalt shingles.

Q. Those would be looking toward the area where the sawmill had been stored?

A. No, that would be in the opposite direction, right back of it. The sawmill would be ahead of this, and this is in back of it there.

Q. The open spot at the top——

A. That was caused by the fire. It burned that open.

Q. It burned the roof off?

A. Yes, it did. It burned so bad it caved in.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.)

Q. (By Mr. Hilger): Mr. Jensen, can you identify this picture for us?

A. Yes, that was on the inside.

Q. It would be on the west side of the building?

A. Yes, showing a little of the carriage, and where moldings and fence material had been stored.

Q. The floor area appears down toward the bottom of the picture? A. That is right. [74]

Q. And that would have been the floor on which this storage was? A. Yes, it was.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon re-

(Testimony of Hyrum Jensen.)

ceived in evidence and marked Plaintiff's Exhibit 13.)

Q. (By Mr. Hilger): Can you identify this photo, Mr. Jensen?

A. That is also in the middle part where our lumber was stored.

Q. Would the photographer have been standing in the southwest corner for the taking of that picture? A. Right, yes.

Q. He would have been looking out from here across north? A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 14.)

Q. (By Mr. Hilger): Can you identify this photograph for us, Mr. Jensen?

A. That was leading up to the upstairs offices, in that neighborhood there.

Q. That would have been in the east part of the building? [75]

A. And in the southeast.

Q. That would have been to the east of the——

A. Going up those stairs and over.

Q. It would have been to the east of this dividing partition? A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order.

(The picture referred to was thereupon re-

(Testimony of Hyrum Jensen.)

ceived in evidence and marked Plaintiff's Exhibit 15.)

Q. (By Mr. Hilger): Mr. Jensen, here is a final photo. Can you identify that for us?

A. That is also a storage place where lumber was stored or moldings and so on.

Q. That would have been the storage area over next to the sawmill? A. Yes.

Q. And this appearing in the right portion of the picture behind the post would be a portion of the remains of the sawmill?

A. Yes, it would. There is a carriage there, see? There is the feed.

Q. This picture then was taken from the east side of this partition? A. Yes.

Mr. Hilger: I offer this as Plaintiff's next in order. [76]

(The picture referred to was thereupon received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Hilger: I am just about to start in a new area. Do you wish to open it up before the recess?

The Court: The Jury has not finished looking at the photographs. You might pursue it a little bit and then we will take a recess.

Q. (By Mr. Hilger): Mr. Jensen, did you go upon the premises at all after the fire?

A. I beg your pardon?

Q. Did you go upon the premises at all after the fire? A. Yes, I did.

(Testimony of Hyrum Jensen.)

Q. When did you first arrive on the scene after the fire started?

A. I was out at lunch at the time. I had left the place about five minutes after 12, which we do every day. We close the place up completely during the noon hour. And I had gone down on Broadway for lunch, and I got back about half past.

Q. What did you see when you arrived inside of your place at 12:30?

A. I heard the sirens several blocks away. We kept driving up that way. We could see a big pillar of smoke. I got within, I think, about two blocks. There was so much traffic that I couldn't get through, and there was one of the police officers that I knew very well. He said, "You follow me and I will get [77] you through." So he did, and we went around through some alleys, cut back over, and I got back, and that was the first I knew of it.

Q. What was the first thing you did when you got to the fire?

A. Well, I tried to run over to the office to get some records and stuff out of there. I had a lot of titles and one thing and another, equipment in there, and one of the police officers grabbed me or else I would have gone in there anyway.

Q. At that time was the building burning?

A. It was all on fire. The smoke was rolling out of the front doors, where the office was. There was no fire at that particular spot but heavy smoke.

(Testimony of Hyrum Jensen.)

Q. Was the fire-fighting apparatus in operation at that time?

A. I think I seen them put the hose on just as I came up for the first time.

Q. You observed no water being directed at the fire as you came up?

A. I hadn't seen it. It looked to me like they put it there at that time, and I was told afterwards that was the first water.

Mr. Castro: I object to this as hearsay.

The Court: What the witness was told may go out.

Q. (By Mr. Hilger): After the fire was put out, did you do anything else in connection with it during the existence of [78] the fire, that is, yourself personally?

A. Yes, we went in and looked things over.

Q. When was this? During the fire?

A. Right after the fire.

Q. You mean after it was put out?

A. Yes. Mr. McBeth, one of the firemen, was there and he asked me how I thought it caught fire, and I told him I didn't know. I said, "I think somebody set it afire." I said, "We had better get an investigator." I told him and the fire chief. In the meantime we walked outside. Mr. Moser—he is a truck dispatcher that is on the opposite corner—two fellows, truck drivers, told him that they had seen two men——

Mr. Castro: Just a moment.

(Testimony of Hyrum Jensen.)

The Court: This will be hearsay, I'm afraid, counsel.

Mr. Hilger: I'm afraid that would be, your Honor. I want to establish this fact:

Q. Did you receive information concerning anyone being seen around the place?

A. Yes, I did.

Mr. Castro: I object to that as hearsay.

Mr. Hilger: I just want to find out if he received that information.

Mr. Castro: I object to that as hearsay. What information he may or may not have received in the absence of the defendant, your Honor, I believe is hearsay. [79]

The Court: As long as he does not say what it was, he may use that fact as a preliminary to something that he did. I can't tell.

Mr. Hilger: Precisely, your Honor.

The Court: The witness is not to testify to what he heard, but he did receive some information and that much I will allow.

Q. (By Mr. Hilger): You received some information concerning someone seen at the fire, and thereupon what did you do? A. Yes, I did.

Mr. Castro: Just a moment. Your Honor, I object to that as calling for hearsay.

The Court: I will rule on it after I hear his answer to the next question.

Q. (By Mr. Hilger): What did you do with the information so received?

A. I called Mr. McBeth, the fireman, and the

(Testimony of Hyrum Jensen.)

chief of the firemen, and a couple of police officers and told them.

The Court: All right. You gave the information that you received to some police officers.

The Witness: Yes, I did, and the fireman, Mr. McBeth, and I told him——

The Court: You can't say what you told them.

Mr. Hilger: Without saying what you said——

The Witness: I will keep still. [80]

Mr. Hilger: You passed on the information you received.

The Witness: Okay.

The Court: I will allow the answer to stand for the purpose stated. The witness received some information and passed it on to the police officers.

Q. (By Mr. Hilger): Mr. Jensen, at any time since the fire have you received any information from any source regarding the origin of this fire which could have been passed on either to the insurance company or to the——

Mr. Castro: I object to that as uncertain and hearsay on its face, your Honor.

The Witness: I didn't hear the question.

Mr. Hilger: I haven't finish the question.

The Court: Just a moment. In your opening statement you refer to the fact that you raised as a defense that there was a breach by the insured in not passing on, not giving correct information to the insurance company.

Mr. Castro: Concerning invoices; that was the only statement.

(Testimony of Hyrum Jensen.)

The Court: That is the only thing you referred to?

Mr. Castro: That is right. That is the only argument I made on that information.

The Court: Read the question.

(Question read.) [81]

A. Yes.

The Court: You will have to reframe the question.

Q. (By Mr. Hilger): Have you ever received any information since the fire concerning its origin which you have not passed on to the insurance carrier or to the investigating public officers?

The Court: Assuming the objection to that question, I will overrule it.

A. I have.

Mr. Hilger: The question is have you received any information which you have not passed on?

A. No, I have not. Every time——

The Court: You have answered it. You see, if you start talking some more, it gives the lawyers a chance to fuss around some more. Just answer the question.

Q. (By Mr. Hilger): Mr. Jensen, have you ever since the fire submitted to an examination under oath at the request of the insurance company?

A. I'm sorry, I didn't hear you.

Q. Have you at anytime since the fire submitted to an oral examination under oath at the suggestion of the insurance carrier?

A. Yes, I have.

Q. That was on October 12, 1956?

(Testimony of Hyrum Jensen.)

A. I think that is right.

The Court: I think perhaps we might take the [82] recess at this time. Members of the Jury, we will take the usual afternoon recess at this time.

(Recess.)

Q. (By Mr. Hilger): Mr. Jensen, after the fire did you receive any instructions from a representative of the Boston Insurance Company regarding the care of the inventory that was damaged in the fire? A. Yes, sir.

Q. If so, from whom?

A. Mr. Troy and Mr. McBeth of the local city fire department, and Mr. McMullin.

Q. Mr. McMullin is with the General Adjustment Bureau? A. Yes.

Q. They were adjusting this fire for the Boston Insurance Company? A. That is right.

Q. When did you receive your first such instruction after the fire? A. When did I what?

Q. When did you receive your first instruction after the fire from any of these gentlemen?

A. I think we sat up with them two straight nights.

The Court: When was it?

Q. (By Mr. Hilger): When did you get your first instruction? [83]

A. About two days after the fire.

Q. Who gave you that particular instruction?

A. Mr. Troy and Mr. McMullin.

Q. McMullin? A. McMullin, yes.

Q. What was that instruction?

(Testimony of Hyrum Jensen.)

A. They told us to go up and get some signs "Keep Out" and we put some boards on it, and they said they would take over from then on.

Q. Did you put the signs on as requested?

A. I did, with the help of Mr. McBeth.

Q. Did you put boards on?

A. The fire chief had already put most of them on. I put some more on.

Q. Prior to receiving that instruction what had you done in connection with caring for the inventory that had been damaged?

A. Two nights before we sat up with it all night to take care of it so somebody wouldn't steal it, and after that we didn't. We just let the insurance company handle it.

Q. That was after your instruction from Mr. Troy and Mr. McMullin? A. Yes.

Q. Did you receive any further instructions thereafter from any of these gentlemen whom you have named? [84] A. Yes, I had.

Q. When was the next such instruction?

A. I imagine it was about a week.

Q. Who gave you that? A. Mr. McMullin.

Q. What did he tell you to do?

A. He told me he had no authority to let me go in and take any of my records or anything, leave them in there, because all the doors was busted out, windows and everything, and people were striking it overhead.

Q. Had you made any request to remove or preserve your records?

(Testimony of Hyrum Jensen.)

A. Yes, I had; yes, I had.

Q. Did you have any further instructions from any of these gentlemen after the second one here that you referred to? A. Yes, I had.

Q. When was the next one?

A. Seems like it was sometime in August, when there was a couple of firemen came down and I asked them if we couldn't do something with this, clean it up. I wanted to go back in it again.

Q. Are you talking about the two firemen?

Q. (By the Court): Who was this conversation with?

A. With a couple of insurance men.

Q. Who were they? [85]

A. I don't recall their names. Do you remember, Mr. Hilger?

Mr. Hilger: No, I do not. I do not think I was present at that discussion, Mr. Jensen.

The Witness: Anyway they represented themselves to me as from the insurance company. They did tell me their names but I don't remember them.

Q. What was the object of that discussion, Mr. Jensen?

A. I just told them I would like to go back in business again if they would let me do something with the building, tear it down, and they said no. So that was all there was to it. I tried to get my records out, and every day you could see where some of the merchandise was missing.

Q. You caused an inventory of the merchandise

(Testimony of Hyrum Jensen.)

to be made for the purpose of the proof of loss, did you not? A. Yes, I did.

Q. Is any of that missing inventory included in that proof of loss?

A. No, I instructed Mr. Fox and my son Dee to go in——

Mr. Castro: This is hearsay, your Honor.

Q. (By Mr. Hilger): I only want to know at this time, Mr. Jensen—perhaps it will be further developed upon cross examination—but was any of the inventory that you believe disappeared after the fire, was any of that included in your claim for payment from the insurance company?

A. No. [86]

Q. Just the merchandise that was actually there to be counted?

A. That is right, other than the molding, and that was burned and we couldn't count that.

Q. That, of course, disappeared in the fire?

A. Yes.

Q. I'm talking about anything that disappeared after the fire. A. That is right.

Q. None of that was in your claim against the insurance company? A. No, sir.

Q. Has any demand been made upon you for the production of any of your records by the insurance carrier?

A. Not until, I think it was, October.

Q. Of 1956? A. Yes.

Q. At that time did you produce your records?

A. I did.

(Testimony of Hyrum Jensen.)

Q. Of what did they consist at that time?

A. Well, they was all wet and strung all over the building down there, and I picked up everything I could find that had writing on and put them in boxes and put them in storage.

Q. That was not until this past summer that you picked them up? [87]

A. [No answer in transcript.]

Q. Getting back to last October, what did you do at that time in connection with making them available to the insurance carrier?

A. I would try to cooperate with them.

The Court: What did you do?

Q. (By Mr. Hilger): Did you authorize anyone to go down and look at the records that were there?

A. Well, the insurance people, they had asked me several times if I had done anything with them, and I told them no, and they was always down there looking at them and getting what they wanted at all times.

Q. Do you know of any specific instances when they were down there looking at your records?

A. Yes.

Q. When was the first such instance?

A. I remember Mr. McBeth and Mr. McMullin came down and was taking pictures, and my son Dee and I walked up there, and they were taking pictures in there, and they were taking pictures all over, on empty shelves, and so on, and I asked them why they didn't take pictures——

(Testimony of Hyrum Jensen.)

Q. I am speaking now in relation to the records, Mr. Jensen. When to your knowledge did they first make reference to your records?

A. That was just last summer sometime.

Q. In October of 1956 did they send anyone up at that time [88] to look at your records, go down there with anyone from my office to look at the records? To refresh your recollection, Mr. Jensen, as to dates that was prior to your examination under oath last October.

A. No.

Q. You do not recall that?

A. No, I do not.

Q. Have you ever refused to make available your records at any time when you have been requested?

A. No, sir, I have not.

Q. Do you have in your possession or in your custody or under your control any records which you have not made available upon request to the insurance company?

A. No, sir, I picked up everything that I could find that had writing on and took it up to your office.

Q. That was in approximately July of this year?

A. I think it was.

Q. And if a request had been made last October, you did not refuse it?

A. No, I had not.

Q. Do you recall Mr. Stearns and Mr. Bridle of Peat, Marwick, Mitchell & Company coming up about a week prior to your examination under oath and going down with me to your office?

(Testimony of Hyrum Jensen.)

A. Yes, I do.

Q. At that time the records were examined by Mr. Stearns and Mr. Bridle? [89] A. Yes.

Q. And that was subsequent to a letter of demand that had been made upon you by the insurance carrier? A. That is right.

Q. And at that time were all the records that you had in your custody or control made available to myself, Mr. Stearns and Mr. Bridle?

A. Yes, they were.

Q. And now, you submitted to an oral examination under oath about a week after the accountants were up to look at the records. At that time did you reveal your principal suppliers to the insurance carrier? A. Yes, I did.

Q. You named them by name?

A. Yes, I did.

Q. Have you ever contacted any of those suppliers in regard to their supplying information to the insurance company regarding your purchases from them?

A. I have talked to them on different occasions.

Q. Have you indicated the possibility that they would be called upon or could be called upon to provide information concerning your purchases?

A. I think I did.

Q. Who was that? [90]

A. That was Eureka Redwood.

Q. Did you see Mr. Henning at Rice Supply, or talk with him in that connection?

A. Yes, I did, that is right.

(Testimony of Hyrum Jensen.)

Mr. Castro: What was that name?

Mr. Hilger: Mr. Henning of Rice Supply.

Q. At the time of this fire, Mr. Jensen, was there any equipment or items in the building that were not covered by insurance?

A. Yes, there was. I had a big fork lift that we handled lumber with.

Q. Is that a piece of equipment that is mobile, that can be moved around? A. Yes, it is.

Q. It is equipped with tires?

A. Yes, a fork lift that would raise a thousand feet of lumber eight or nine feet, that we used for handling lumber in the yard.

Q. Transporting it from one place to another?

A. Yes. That was in the shed.

Q. Is that ordinarily used inside or outside?

Q. That was used outside. It happened by misfortune it was left in there that night.

Q. What is the value of that piece of equipment?

A. About \$2500, I figured. It was used. It had been used. [91]

Q. Was there any fire insurance on that piece of equipment?

A. No, there was not, not that I know of.

Q. If you knew of any you would make a claim of it?

A. I should have run it out the night before.

Mr. Castro: I move that that be stricken, your Honor.

The Court: Yes, it may go out.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Hilger): What other items, if any, were there in the building that were not covered by insurance?

A. There was a lath machine, a bolter and an edger.

Q. What would be the value of those pieces of equipment? A. About \$1400.

Q. And that was not covered by insurance?

A. No, it was not. I just put that in.

The Court: You have answered. It was not covered by insurance.

The Witness: No.

Q. (By Mr. Hilger): Was there any other equipment or items that were not covered by insurance in the building?

A. Yes, there was quite a bunch of truck tires, electric welder——

Q. How many truck tires about, as well as you can recall? A. I would say seven or eight.

Q. Do you know the cost of a truck tire of that description?

A. Around about \$135 or \$140 apiece.

Q. They are for the large diesel type of trucks?

A. Yes. [92]

Q. Were those tires covered by insurance?

A. No.

Q. Was there anything else in the building not covered by insurance? I believe you mentioned a welder when I interrupted.

A. Yes, there is a welder that belonged to one of my sons; an acetylene outfit; a lot of oil filters,

(Testimony of Hyrum Jensen.)

oil baths, they call them, air pump, pressure guns, and a lot of equipment like that, that I couldn't mention that was in there. A lot of high-priced tools. They were not insured.

Q. Mr. Jensen, when you purchased this piece of property at Third & Commercial, what did you pay for it?

A. I think it was about \$42,250, somewhere around in there. I am not right sure.

Q. Do you know the value of the building that was on the premises at the time of the fire?

A. Yes, after I remodeled it and everything it was between \$30 and \$35,000, the building was worth.

Q. How much fire insurance was carried on that building at the time of the fire? A. \$10,000.

Q. Was that the entire extent of the fire insurance on the building?

A. Yes, that was all the fire insurance we had on the building. [93]

Q. (By the Court): Was that carried by the same company or by a different company?

A. No, that was a different company. They paid off.

Mr. Castro: I would like to make a statement, your Honor, that that was covered by the Pennsylvania Insurance Company, which paid off to the Crocker Anglo Bank on a loan basis.

Mr. Hilger: As a loss payee.

The Court: They had the insurance policy with a loss-payable clause to the bank?

(Testimony of Hyrum Jensen.)

Mr. Castro: Yes.

Mr. Hilger: There was a deferred balance due on the property, your Honor, and so naturally there was a loss payable.

The Court: The loss was payable on the insurance policy on the building to the bank.

Mr. Hilger: Reference is made back to the analysis of payments to Anna Hess, the \$10,000; that was the proceeds of that policy that was applied on the note representing the unpaid purchase price.

The Court: Go ahead.

Q. (By Mr. Hilger): When did you acquire the Eureka Lumber Company, Mr. Jensen?

A. Sometime in 1953 or 1954. I can't remember. I think it was August of 1954.

Q. August of 1953?

A. Three, yes, that is right. [94]

Q. And do you have a recollection of your operations during the calendar year 1954?

A. About \$5,000.

Q. What are you referring to now by \$5,000? Is that sales net profit?

A. Net profit, our net profit.

Q. Do you recall approximately what your gross sales were during that year?

A. I can't exactly.

Q. What is your best recollection in that respect?

A. Somewhere about \$75,000, but I am not up on that. My son kept those books and I couldn't say.

(Testimony of Hyrum Jensen.)

Q. Do you have a recollection of the gross sales in 1955?

A. I know it more than doubled.

Q. Do you have any recollection of your net profit in 1955? A. I can't recall exactly.

Mr. Hilger: May I have the financial statement that is attached to the deposition of A. J. Franceschi.

Q. (By Mr. Hilger): From time to time in connection with your bank credit did you submit to the Crocker Bank or its predecessor, the Bank of Eureka, financial statements?

A. Yes, I did.

Q. Those financial statements were prepared from your books and records?

A. Yes, they were. [95]

Mr. Hilger: I will offer that in evidence.

Mr. Castro: I object to it as hearsay, your Honor, a financial statement.

The Court: You had better lay the foundation for it as to whether or not it is correct before you offer it.

Q. (By Mr. Hilger): You indicated you submitted these financial statements from time to time prepared from information taken from the books and records. I will show you a financial statement purporting to show financial condition at the close of business on December 31, 1954, and ask you, first of all, if that is your signature that appears thereon? A. Yes, it is.

Q. Are these figures that were inserted there

(Testimony of Hyrum Jensen.)

taken from your books and records maintained in the usual course of your business?

A. Yes, they were.

Q. Will you look at the various figures and items contained thereon and tell us if that is an accurate statement of your financial condition as revealed by your books and records on December 31, 1954?

A. It would be accurate or I wouldn't sign it.

The Court: Was it?

Q. (By Mr. Hilger): Was it? Yes or no.

A. Yes, I am sorry.

Q. I will likewise show you a financial statement purporting [96] to show your financial condition and the result of your operations for the calendar year 1955, and I ask you if that was prepared from your books and records?

A. Yes, it was.

Q. Did you own all the real property that was listed on page 4 thereof, Mr. Jensen?

A. No, I did not. This fresh water property, I never owned that.

Q. Who owned that?

A. That was my son Dee's. He had contracted for it.

Q. I would like to have you look at the remaining items in that financial statement. Incidentally, that is your signature that appears thereon, is it not?

A. Yes, it is.

Q. Tell us whether or not that is accurate, aside from the fresh water property that you refer to, if

(Testimony of Hyrum Jensen.)

that is an accurate statement of your financial condition on December 31, 1955, and an accurate report of your operations for the calendar year 1955?

A. Is this 1955 or 1956?

Q. You are correct. This is June 1st, 1956 as to the balance sheet.

A. That is correct.

Q. Now, there is also a statement of income and expense attached thereto showing or purporting to show the profit and [97] loss from January 1st to December 31st, 1955. Is that an accurate statement of your operations as reflected on your books of account for the period shown? A. Yes, it is.

Mr. Hilger: I will offer these, the statement of December 31st, 1954, as the Plaintiff's next in order——

Mr. Castro: I object to it as hearsay, your Honor.

The Court: I will overrule the objection. The witness has stated this is a true statement of his financial affairs.

(The financial statement referred to was thereupon received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Hilger: And I will offer at this time the financial statement bearing date June 1st, 1956, as the Plaintiff's next in order.

Mr. Castro: I object to it as hearsay, your Honor.

The Court: Same ruling.

(Testimony of Hyrum Jensen.)

(The financial statement referred to was thereupon received in evidence and marked Plaintiff's Exhibit 18.)

The Court: Strictly speaking, I suppose, it might be considered as rebuttal testimony, but since that is only a matter of order of proof, I admit it at this time.

Mr. Hilger: Those are all the questions I have at [98] this time.

Cross Examination

Q. (By Mr. Castro): Is this your signature (handing a document to the witness)?

A. Yes, it is.

Q. And that is your signature to the proof of loss that you have made concerning stock?

A. As far as it was furnished to me it was.

The Court: Is that a different one than the one that has been offered in evidence?

Mr. Castro: I believe that the one in evidence is a photostatic copy of this document, your Honor.

The Court: All right.

Q. (By Mr. Castro): In that proof of loss you claim you had property of a total value of \$63,-549.54.

The Court: Well, it says so in there. What is the next question.

Mr. Castro: That is correct.

The Court: You have asked him whether something isn't in there. Anybody can see that.

Q. (By Mr. Castro): And you claim that you

(Testimony of Hyrum Jensen.)

lost and were damaged in the sum of \$33,549.54 of that property, did you?

A. If I signed this, yes.

Q. That is your signature, isn't it?

Mr. Hilger: He has already answered that question. [99] The document speaks for itself.

The Court: Sustained.

Mr. Castro: He said if he signed that, and that is why I repeated the question to him.

Q. (By the Court): You signed this?

A. Yes, I did.

Q. You have already testified you signed it?

A. Yes, I did.

Q. (By Mr. Castro): Of that property you claim \$7,500 represented one sawmill?

A. I didn't hear you. I am sorry.

Q. In that proof of loss you signed you claimed one part of your loss was a sawmill worth \$7,500?

A. Yes.

Q. You then said that you had hardware material, building material, worth approximately \$5,400?

A. Yes.

Q. And that you had redwood molding and window casings of 60,000 board feet? A. Yes.

Q. And you had fence boards of 35,000 board feet? A. Yes.

Q. And you had lumber outside of the building of the value of \$30,000?

A. I never valued any lumber outside of the building. [100]

Q. In the proof of loss under Exhibit 7 you

(Testimony of Hyrum Jensen.)

claimed, did you not, that you had lumber of assorted widths and lengths outside the building of \$30,000 value?

A. Not outside the building, no.

Q. Did you claim that you had it adjacent to the building?

A. Did I claim what?

Q. Adjacent to the building?

A. It was in the building.

Q. I call your attention to Exhibit C of that proof of loss which you signed. Is there any error in Exhibit C of that proof of loss?

Mr. Hilger: I am going to object to this as being immaterial to any issue in the case. The proof of loss itself states this is inventory undamaged by the fire. A proof of loss is inadmissible in and of itself to prove the loss for or against. It is merely admissible in evidence to prove compliance with policy requirements, and no claim of loss was made for the \$30,000 of lumber outside the building in the open yard that was not damaged, and it would be irrelevant to pursue the subject.

Mr. Castro: It is all part of the same proof of loss that was filed, your Honor.

The Court: Why don't you read this before you answer the question. It says here "Inventory undamaged by the fire," and it refers to some lumber stored in a lot adjacent to the building, \$30,000.

The Witness: That is an error. It was stored in the building. May I say when I was young I never had a chance to go to school.

(Testimony of Hyrum Jensen.)

Mr. Castro: I move to strike that as not responsive to any question.

The Court: That happens to a lot of people. You don't have to make any explanation. I understood your testimony to be that in the yard adjacent to the building that there was material stored there, too.

The Witness: No—there was material stored in the yard, plenty of it, outside, but we didn't make claim for it.

Q. (By the Court): That is what it says here. I will read it to you. It says, "Inventory undamaged by fire, lumber, assorted widths, lengths and grades, stored in yard adjacent to the building." So if it was undamaged by the fire, you were not making any claim for it?

A. That is right.

Q. Then there was material there that was outside the building but it was undamaged, and you did not make any claim for it?

A. That is right, yes. I'm sorry. I didn't understand you.

Q. (By Mr. Castro): Who made out that proof of loss?

A. I hired a Mr. Fox and my son Dee.

Q. Did they present it to you for your signature?
A. Yes, they did. [102]

Q. Did you read it over before you signed it?

A. They told me it was correct, and I took their word for it and signed it.

(Testimony of Hyrum Jensen.)

Q. In the proof of loss it refers to 66,000 board feet of redwood molding, \$14,000?

A. That sounds about right.

Q. Where did you buy that molding?

A. Eureka Redwood and Arcata Redwood.

Q. When did you buy it from the Eureka Redwood? A. Oh, within the last two years.

Q. When did you buy any from the Arcata Redwood? A. The last two years.

Q. Do you have any invoices from the Arcata Redwood Company to show any purchase of such redwood? A. We did have.

Q. Do you have any at the present time?

A. No, I do not.

Q. Have you asked them to give you a copy of any invoices concerning redwood that you purchased from the Arcata Redwood?

A. My son did, yes.

Q. Did you? A. No.

Q. Did you get copies from them?

A. We did get copies, yes.

Q. Where are the copies? [103]

A. They were destroyed in the fire or else the insurance people picked them up for records.

Q. When did you ask them for those? Was it before or after the fire?

A. I didn't ask. My son did.

Q. Was it asked for before or after the fire?

A. It would be after the fire because we had them before the fire.

Q. You asked for them after the fire?

(Testimony of Hyrum Jensen.)

A. Yes, it would be after the fire.

Q. And they gave them to you after the fire?

A. I don't know.

Q. Did they give them to you after the fire?

A. I don't know. No, not as I know of. That wasn't my part. My son was keeping my books and the financial deal, and that was his duty.

Q. Did you ask the Eureka Redwood Company after the fire for any invoices? A. Yes.

Q. Did they give you any invoices?

A. Yes.

Q. Where are the invoices they gave you?

A. I think Mr. Hilger has them.

Mr. Castro: Do you have them, counsel?

Mr. Hilger: You have previously been supplied with [104] all of them.

Mr. Castro: Which ones are they, counsel, so there will be no mistake in the record if they are here?

Mr. Hilger: All those that were found were turned over to you forthwith. Then you asked that you be permitted to contact the redwood company in San Francisco, and you got more invoices than I have got.

Mr. Castro: Were those the invoices that were referred to in the deposition of Haley J. Bertain, which was taken in your office on September 19th of this year?

Mr. Hilger: That is correct.

Mr. Castro: May we have those, your Honor.

(Documents handed to counsel.)

(Testimony of Hyrum Jensen.)

Q. All the redwood that you purchased for molding from the Eureka Lumber Company amounted to approximately 20,000 board feet, did it not?

A. It amounted to about 200,000 board feet.

Q. I call your attention to the deposition of——

Mr. Hilger: I will object to that as an improper use of a deposition. The testimony that others might give is entirely immaterial to the truth or lack of truth of this witness.

Mr. Castro: Then will you produce those invoices? You said they were here. That is why I asked about the deposition.

Mr. Hilger: Counsel was present at the taking of [105] that deposition. Counsel had access to Mr. Klenz of the company in San Francisco. Mr. Bertain of the Simpson Redwood Company said he would make sure Mr. Castro could get all the invoices which were in the San Francisco office after the taking of this deposition. If counsel hasn't gotten them, that is counsel's unfortunate situation. We had a summary of those at the taking of this deposition of Mr. Bertain, which he had received by telephone in Eureka upon the occasion of the taking of this deposition. The use of that summary was objected to by counsel, and it was therefore suggested that he obtain his invoices, and he was told where he could get them. I have no invoices.

Q. (By Mr. Castro): Mr. Jensen, between August of 1955 and June of 1956 isn't it a fact that all redwood molding which you purchased from the

(Testimony of Hyrum Jensen.)

Eureka Redwood Company amounted to approximately 21,000 board feet?

A. No, it amounted to probably 200,000. We bought molding stock from other people, too.

Q. Isn't it a fact that that redwood molding which you purchased from the Eureka Redwood Company was what they call factory cuts?

A. That is true, factory odds.

Q. Under factory cuts isn't it understood to mean reject molding? A. That is right.

Q. Didn't you pay approximately \$20 a thousand for the [106] rejects that you purchased between August, 1955, and June of 1956?

A. All the way from \$20 to \$75 a thousand.

Q. Isn't it a fact that you only paid \$20 a thousand? A. We paid \$20 to \$75 a thousand.

Q. You paid \$75 a thousand for what from the Eureka Redwood Company?

A. For some of the molding.

Q. From whom?

A. Different people—Eureka Redwood, Arcata, Holmes Eureka, Vandermeer.

Q. Do you recall your examination under oath which was taken about two months after the fire or three months after the fire? A. Yes.

Q. I ask you to look at page 51, lines 8 to 11. Will you read those questions and answers to yourself? Have you read those four lines?

A. Yes.

Q. Did I ask you these questions on October 12th, 1956, in the presence of your counsel, Mr.

(Testimony of Hyrum Jensen.)

Frederick Hilger, page 51, beginning at line 8 to 11:

“Q. Where did you buy your moldings?

“A. Eureka Redwood. We made a lot of that, too, ourselves.

“Q. Cash or credit basis with Eureka Redwood?

“A. We bought that through Hill & Morton.”

Did you give those answers to those questions?

A. That is correct. I answered it as you read them, that is correct.

Q. You didn't tell me any place else that you bought it at that time, did you?

A. Perhaps I didn't remember, recall. I told you every one I could remember.

Q. Those were green, were they not?

A. We bought green and dry.

Q. How many did you buy green between August, 1950 and June of 1956?

A. That I can't remember.

Q. Approximately? A. I can't remember.

Q. From the Eureka Lumber Company. Can you give us any estimate on that? A. No.

Q. Can you make molding from green redwood?

A. That was kiln-dried that we bought.

Mr. Castro: I move to strike it out as not responsive to the question.

The Court: It is not responsive.

Q. (By Mr. Castro): Can you make salable molding from green redwood? [108]

A. We made molding stock at times from green redwood, if the buyer desired green stock, and he would run it through his kiln dry.

(Testimony of Hyrum Jensen.)

Q. Do you make redwood molding from green redwood? A. We have, yes.

Q. Did you have any green redwood on your premises at the time of this fire?

A. I believe we did.

Q. Where did you keep it?

A. In the yard, or in the back yard. I think there was a little green in the shed.

Q. Where did you keep the green redwood that you say you had in the back yard?

A. Different places in the yard. Most of it was across the street.

Q. When you are talking about the back yard are you speaking of a position outside——

A. Out in the open.

Q. Outside of this building which is in the diagram? A. Yes.

Q. How much green redwood did you have outside the building at the time of this fire?

A. That I can't tell. I can't remember.

Q. Approximately?

A. I can't remember. [109]

Q. Can you give us any approximation?

A. No.

Q. How much of an area do you need to store 66,000 board feet of lumber?

A. Not very much if you pile it up high enough.

Q. How high would you pile it?

A. Oh, six, seven or eight feet, ten feet, thirteen feet at times.

Q. How wide an area?

(Testimony of Hyrum Jensen.)

A. They run four feet wide.

Q. And for what length?

A. It all depends, from four feet up until twenty, twenty-two.

Q. This 66,000 feet of redwood molding that you talked about, where was it located in the building?

A. In this part right here (indicating). It was located along in here, up to the sawmill, down through here, and there was a pile of fence stock over here in the green, and also piled here back of the door and down through here, clear to this door. Then there was some piled right in here. We had run a truck in here, and we had throwed the lumber that was on this side over on this side.

Q. Will you draw a red line along the west side of that shed where you say you had redwood molding?

A. No, I haven't drawn any line. I am showing you where it is. [110]

Mr. Castro: May we have the witness draw a line where he has indicated it was along the west side of that shed, the redwood molding?

Q. (By the Court): Why don't you want to draw?

A. I would just as soon draw a line if it is necessary.

Q. I think you had better answer his question.

A. It won't hurt to do it twice. Okay. We had stock up in here (indicating).

Mr. Castro: Would you make a line so it will be seen, sir?

(Testimony of Hyrum Jensen.)

A. Do you want me to write a couple of times on it? Do you want me to show you where all the molding was, how far it extended toward Third Street? I don't know how far it would be. It would be like from this door here, long enough to take a truck. It would be about to here, if I remember correctly.

Q. How far out did it extend from the wall?

A. This was piled to the wall.

Q. How far out was it from the wall?

A. As far as I remember it ran all the way from four to ten feet.

Mr. Castro: May we mark that redwood molding, your Honor, on the diagram?

(Diagram marked.) Mark it kiln-dried redwood.

Q. Was it molding?

A. Molding and baseboards, and molding for door sashes. [111]

Q. You say it extended about how far out from the wall? A. I can't tell you exactly.

Q. Approximately?

A. I would say six, seven or eight feet.

Q. Then did it extend along the west side of the wall right to the end of the building?

A. Yes, it did.

Q. Did it extend beyond the edge I am pointing to?

A. There was a door right in there. We had that open.

Q. That door was kept open at all times, wasn't it? A. Yes, I think it was.

(Testimony of Hyrum Jensen.)

Q. How high did you have the redwood along the west wall?

A. I don't remember how high that was.

Q. Approximately? A. I don't remember.

Q. Was it as high as your knees, your waist, or was it higher?

A. I can't remember. I know there was redwood piled all the way along there.

Q. Approximately how high?

A. I don't remember.

Q. Where is the next point that you had the redwood molding stored?

A. We had redwood molding sitting beside our sawmill, about in here back of this door, clear back up in here, where we had [112] fence material in this corner, and there was fence material strung in between this molding, too. It had been sorted out, but it had laid there for the last two years or such a matter, and we had sold pieces now and then, and we had scattered it around a little bit.

Q. Will you draw a red line where you state you had redwood molding along the east side of the shed?

(The witness indicated.)

Mr. Castro: May we mark that redwood molding, your Honor?

The Court: Very well.

Q. (By Mr. Castro): What was the width of this redwood molding?

A. I don't remember how wide that side was.

Q. How far did it extend out from the wall?

(Testimony of Hyrum Jensen.)

A. Right to the wall.

Q. How far did it extend out from the wall?

A. I don't remember how far it did.

Q. You indicated that on the west side it extended from six to eight feet?

A. Yes, that's right.

Q. Did it extend out six to eight feet on the east side?

A. I don't remember whether it was the same length or not.

Q. Will you give us an approximation of how far it extended out? [113]

A. No, I can't. I don't remember exactly.

Q. Can you give us an approximation as to the height of the redwood on that side?

A. It varied in height. It would run from, I would say, four feet up to eight or nine feet.

Q. How big were the sawmill tracks?

A. It was 40 feet long, 10 feet wide.

Q. What did the tracks sit on?

A. It sat on 4x12—or 12x12, I believe it was.

Q. Did the sawmill start at the front side of the building?

A. Yes, it did.

Q. And then it extended back for the length of the logs some 40 feet?

A. It was out the front door probably a couple of feet. It couldn't go inside.

Q. Would you say the logs extended out onto the walk area?

A. Yes. There wasn't any walk, just out of the

(Testimony of Hyrum Jensen.)

door. We had to push the door back a little to close it.

Q. How far out did those logs extend into the walkway? A. I would say a couple of feet.

Q. And then they extended toward the rear of the building for approximately 40 feet?

A. Yes, they did, about 38 feet or something like that.

Q. When you looked at the front of the building could you see the logs sticking out? [114]

A. I beg your pardon. I didn't hear you.

Q. When you looked at the front of the building and before the fire did you see the logs sticking out? A. I think I did, yes.

Q. And they were sticking out about two feet?

A. As near as I can remember. The door would stick out a little before it would close, somewhere around two feet, I would think.

Q. Were those logs destroyed in the fire?

A. They were burned very bad so they weren't usable.

Q. Were they burned up so they were shorter than 40 feet in length?

A. I never noticed that.

Q. You didn't notice that?

A. No, sir, I haven't.

The Court: Mr. Castro, I think probably we had better suspend. I notice practically all the jurors are from out of San Francisco and there is always a little transportation problem involved. So I will endeavor to adjourn before 4:30 as best we

(Testimony of Hyrum Jensen.)

can, depending upon what the testimony is and what the status of the case is at the time. We will reconvene tomorrow morning at 10:00 o'clock, Ladies and Gentlemen of the Jury.

(Whereupon an adjournment was taken until 10:00 o'clock, Wednesday, September 25, 1957.) [115]

Wednesday, September 25, 1957—10:00 o'clock a.m.

The Clerk: Jensen versus Boston Insurance Company for further trial.

Mr. Hilger: Ready for the Plaintiff.

Mr. Castro: Ready for the Defendant.

HYRUM JENSEN

the Plaintiff herein, was recalled as a witness on his own behalf, and having been previously duly sworn testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Castro): Mr. Jensen, did you file a personal income tax return with the United States for the calendar year 1956? A. We did.

Q. When you say "we did," whom do you mean by "we"? A. I did.

Q. Where did you file it? A. Santa Rosa.

Q. Did you pay any tax?

A. No, I asked for an extension until I had a fire settlement.

Q. Did you file a tax return for the calendar year 1955 with the United States Government?

(Testimony of Hyrum Jensen.)

A. Yes, we did—I did.

Q. Where did you file it?

A. I think that was sent here to San Francisco. My [116] bookkeeper sent it. We had asked for an extension then due to the lumber we lost in the flood of 1955.

Q. With reference to the redwood molding, yesterday we were talking about the sawmill and whether or not it extended out onto the street.

A. As far as I remember, it did.

Q. You recall that it extended out about two feet?

A. Something like that.

Q. Was the position of that sawmill changed at anytime after the fire?

A. I beg your pardon?

Q. Was the position of that sawmill changed at any time after the fire?

A. No, it could have been changed a few days before the fire due to the fact that I had rented space to another man that was doing some work on a portable sawmill, and he may have pushed it in in order to close the doors so he could keep his tools locked up in front.

Q. How far did he push it in the building?

A. I don't know that he did. I say he may have done so.

Q. I show you a photograph taken on August 10th, 1956. Will you examine it? Does that photograph show the front of the Eureka Lumber Company building following the fire?

A. It shows it after the fire, yes.

(Testimony of Hyrum Jensen.)

Q. Does that show the doorway in which the sawmill was [117] located? A. Yes, it does.

Q. Is that doorway the doorway to which I am now pointing? A. Yes, it is.

Q. May we mark that "sawmill"? Now, the front door is also shown in that photograph, is it not?

A. The front office door, yes.

Q. And that is the door which is marked "door" on the diagram?

A. That is the office door.

Q. Does that photograph refresh your recollection as to whether the sawmill was extending out beyond the sidewalk at the time of the fire?

A. Yes, I can see where the ends of the sawmill, the timbers are setting right here (indicating). It looks about even with the building. Evidently the fellows that rented the building had pushed it in so they could close the door.

Mr. Castro: At this time we would offer this photograph in evidence as Defendant's next in order, your Honor.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Castro): Was that sawmill an operating sawmill? A. Yes, it was.

Mr. Castro: May we show this photograph to the Jury, your Honor? [118]

The Court: Yes.

Mr. Hilger: Counsel, I will object to the last

(Testimony of Hyrum Jensen.)

question that was asked, "Was it an operating sawmill," as being indefinite as to time.

Q. (By Mr. Castro): During the month of June, 1956, was this sawmill an operating sawmill?

A. It was ready to be taken out of there and to be used as a portable sawmill. It had never been operated at its present position.

Q. Was it connected with power?

A. Yes, it was.

Q. But it had never been operated?

A. We had tested it and sawed a couple of boards just to see how everything worked.

Q. You referred to the redwood molding being in two places that you marked on the diagram. I believe you referred to it at a third place.

A. Yes, and a fourth. You stopped me before I had a chance to show you.

Q. We will get them all. You put down where the third place was.

A. Right along in here (indicating), and we'll say the sawmill here. We had a platform which had molding and lumber laying on top of this that extended nearly up to the front of the sawmill which the carriage had pulled up to this end, and [119] this was all filled with lumber taken from over here where they had put it in for the little sawmill we built, to put on the sawmill.

I would like to mark, while we are at it, that there was also molding piled up in here and down here, and also down to where the diesel motor sat,

(Testimony of Hyrum Jensen.)

which was back over this way, about like that (indicating).

Q. Mr. Jensen, you have indicated starting at this point there was a stack of redwood molding.

A. Not by the door. It was off to the side of the door, and from this point over there was molding, and there was molding in between the two doors, and there was fence material up in here between this and that door, between here and there (indicating).

Q. Mr. Jensen, this map is drawn to a scale of one inch to three feet, and I am trying to locate the stack which you have indicated as being in this approximate position. Was there a stack a redwood molding in this position?

A. I don't know whether that was redwood molding or it could have been fence material. I'm not sure.

Q. You drew a line starting from this point, which I will designate—your Honor, may we designate it as X-1?

The Court: Yes, anyway, you wish.

Q. Southward to a point which I shall ask to be designated as X-3, and then you drew a line eastward to a point which I will designate as X-4. Was redwood stacked from X-1 to X-3? [120]

A. Not from this line. It was stacked—

Q. When you say "this line," would you point out the line that you have reference to?

A. Yes. I would say from here to here (indicating).

(Testimony of Hyrum Jensen.)

Q. May we mark the line you have just referred to as X-5.

A. There was a small space right in here, between this and that. I believe there wasn't too much, although there was lumber laying there on the ground, but I am not sure about the amount. But here back to the door pretty well, so that a lift truck could get in through here, there was also molding piled in there.

Q. With reference to this area which we have designated at this point as X-5, X-3 and X-4 at the south point, how is that stacked?

A. Some of it was put in piles and some of it was laying rather loose.

Q. When you say some of it was put in piles, do you mean it was just strewn there?

A. In piles—not thrown—it was in a pile.

Q. And you say some of it was loose?

A. Yes, it was. Some of it hadn't been bound.

Q. How high were the piles?

A. I don't remember.

Q. North of that position we have just discussed was there more redwood stacked?

A. There was some. I can't remember exactly how much. [121] Up for a short distance in here, and then from there up here. I think there was some piled in there but how much I don't remember.

Q. Would you mark the point where that stack commences?

A. I have already marked this right in here.

(Testimony of Hyrum Jensen.)

Q. You have drawn a line from X-5 to X-1?

A. That's right. I draw a line in here. There wasn't so much in here, but here there was more.

Q. If I understand your testimony correctly, then, there was redwood stacked from X-1 to X-5?

A. Yes, but how much I don't remember.

Q. How wide was that stacked?

A. That I couldn't remember.

Q. Can you give us an approximation?

A. No, I could not. I just don't remember. I never measured it and I don't know how wide it was.

Q. Was that stacked with stickers?

A. That I don't remember.

Q. Did you have anything in the shed stacked with stickers? A. Yes, we did.

Q. Where was the material that you had stacked with stickers?

A. It was all through the building in different places.

Q. You have indicated that the material from X-1 down to X-3 and X-4 was not stacked?

A. I'm not sure. Some of it was not and some was. [122]

Q. How was it stacked? A. In a pile.

Q. Did it have stickers?

A. Some of it did, I think, and some did not. I'm not sure.

Q. When you are talking about stickers, is that a board upon which the molding is laid?

A. It lays flat on the ground and every so often

(Testimony of Hyrum Jensen.)

we put a sticker through it in order to keep it so it would dry more and keep dry.

Q. How high did you have those piles which you say you had stickers in them between X-1 and X-3 and 4?

A. That I couldn't tell you. I don't remember. I haven't paid enough attention to it.

Q. Didn't you say that you were in there looking this inventory over a week or ten days before this fire to determine whether or not you could supply an order you thought you were going to get?

A. That's right, I did.

Q. Did you look at the inventory?

A. The piles of lumber that was in the building do you mean?

Q. Yes. A. Yes, I did.

Q. And you can't tell us the approximate height of the lumber you had stacked with stickers?

A. No, sir, I can't. We just estimated it. We didn't tally [123] it. We just estimated it, if there was enough in there to fill this order that we had an inquiry about.

Q. You drew a line at this point on this diagram. What was that line supposed to represent?

A. That was lumber.

Q. May we mark the north end of that X-6, the south end of it as X-7. How wide was that lumber? A. That I couldn't tell you.

Q. Was that lumber stacked?

A. Part of it was, yes.

Q. Were stickers used to stack it?

(Testimony of Hyrum Jensen.)

A. That I can't remember.

Q. What was the approximate height of the stack in that area?

A. I can't remember that either. I never measured it at the time and I couldn't say.

Q. You stood alongside the stacks when you looked at them, did you? A. Yes, we did.

Q. Were they lower than your eye view or were they higher?

A. I just don't remember how that was.

Q. Now, what did this line which you drew here refer to?

A. That was the back end of the mill where the carriage would go after a board was sawed off the log and dumped onto the platform, and when we cleared the space here for this portable truck to come in, we piled a lot of lumber over on this platform [124] where the sawmill was.

Q. How big was that platform?

A. I never measured it. I don't know.

Q. Can you tell us the approximate size of that platform?

A. No, I could not because I may misguess.

Q. Was that platform destroyed in this fire?

A. Part of it was, yes.

Q. Was that platform the width of the bunker for the saw carriage? A. I believe it was.

Q. Was it wider than the width?

The Court: I think the witness should sit down.

The Witness: Thank you.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): Was it wider than the width? A. That I don't remember.

Q. Was it shorter than the width?

A. What do you mean "shorter"?

Q. Was it shorter than the width of the carriage bunker? A. No.

Q. Can you give us the approximate length of that platform? A. No, I could not.

Q. You can't estimate the length of that platform?

A. No, sir, I can't because I don't know where the carriage was sitting to the back.

Q. Wasn't the north end of that bunker the terminal end [125] of the track?

A. There was a track all the way along the mill, the track; it ran the full forty feet.

Q. And wasn't the north end of that bunker the terminal end?

A. What do you mean "terminal"?

Q. Where was the saw located?

A. The saw was located in the middle of the mill.

Q. What was located at the street-end of the mill?

A. That was where we put the log on a carriage to saw into lumber.

Q. What did you have to stop the carriage at the north end of the mill?

A. We had a carriage with a friction top. You would push it forward and your carriage would run, push the log through the saw, and you would

(Testimony of Hyrum Jensen.)

automatically stop it and return it back. There was a bumper on the end, which is right where, if this saw carriage got away from the sawyer, it would bump that for a safety device and wouldn't run off the track.

Q. Was this platform you are talking about north of that bunker?

A. No, it was beginning at the bunker south with the bunker.

Q. Was that platform on the bunker?

A. The platform, yes, was on the frame of the sawmill.

Q. Was it on the frame of the tracks of the sawmill?

A. Yes, it was setting there. We built the platform a [126] little wider than the sawmill, I believe.

Q. Then the platform was not south of the bunker, was it?

A. The platform was north—what do you mean by bunker? Let me get that straight.

Q. You used the term bunker in describing what you had at the end of the tracks.

A. It was a bumper. Let me explain here. The sawmill was sitting here, and the truck would run from one end of this to the other, and on this end of the sawmill there was a big 12 x 12 put across the end so if this sawyer at anytime didn't change the gear of the sawmill, it would hit that guard there and wouldn't run off the track. That was for safety devices.

(Testimony of Hyrum Jensen.)

Q. That is the bunker I have reference to.

Mr. Hilger: Are you using the word "bunker" or "bumper"?

The Witness: Bumper.

Q. (By Mr. Castro): I show you a photograph taken on August 10th, 1956. Does that show the carriage bunker?

A. No, it does not. The carriage must be setting back up to this end on the south end of the building.

Q. Does it show the platform on which the tracks were sitting?

A. It shows the platform down below where the offbear would stand to pull off the lumber about four feet or three feet lower.

Q. Does it show the bumper which you had at the north end [127] to stop the saw?

A. I think it does, yes.

Q. Will you point that out? Will you mark on the photograph?

(The witness did as requested.)

Mr. Castro: I will mark that X-1, and I would offer the photograph in evidence as Defendant's exhibit next in order.

The Court: This you said was August, 1956?

Mr. Castro: Yes, August 10th, 1956.

The Court: The previous picture you said was August, 1957?

Mr. Castro: I'm sorry.

The Court: You meant 1956?

(Testimony of Hyrum Jensen.)

Mr. Castro: 1956, your Honor. These were all taken at the same time.

(The picture referred to was thereupon received in evidence and marked Defendant's Exhibit D.)

The Witness: Could I answer that question, Mr. Castro, before the Court looks at that picture?

The Court: What is it you want to say?

The Witness: I would like to explain that the platform on the carriage that the lumber was piled on at that time, the whole thing would move backward and forward, and what he is getting at is the platform doesn't show, but it was on the carriage, and evidently the carriage had been pulled to the south end, and that also pulled the platform, whichever it was, [128] and the lumber was piled on both the platform, front and back.

The Court: What you are saying is the platform was movable?

A. Yes, it was movable.

Q. (By Mr. Hilger): And is it your testimony that that platform does not show in this picture?

A. Part of it shows. The width of the sawmill and the carriage does not show.

Q. (By Mr. Castro): Then this platform that you say moved the lumber from the west wall over was a movable platform?

A. Was it a movable platform?

Q. Yes. A. Yes, it was on the sawmill.

Q. What was the approximate size of that movable platform? A. I don't remember.

(Testimony of Hyrum Jensen.)

Q. Can you give us any approximation as to the size of that movable platform?

A. Yes, it would be, I would say, 20 x 10 feet.

Q. That would be 20 feet long, 10 feet wide?

A. That was the moving platform.

Q. What was the material in that moving platform?

A. I didn't understand the question.

Q. What was the material in that moving platform? A. It was lumber.

Q. Was that platform burned up in this fire?

A. Yes, it was.

Q. I show you Exhibit D. That shows the platform, does it not?

A. Could I explain this more thoroughly to you? You don't seem to understand.

Mr. Castro: I move to strike the answer as not responsive.

The Court: No. Just answer the question as best you can.

A. That is the lower platform where our off-bear stands to pull the lumber off the carriage.

Q. (By Mr. Castro): Will you mark that platform with an X, please?

(The witness did as requested.)

Mr. Castro: I will mark that X-2, your Honor.

Q. Was that composed of wood? A. Yes.

Q. Was that burned up in the fire?

A. It was charred, if I remember right. I didn't pay too much attention to it.

(Testimony of Hyrum Jensen.)

Q. Did you have any of this redwood stacked on that lower platform X-2?

A. I don't know what you mean by the lower.

Q. Did you have any of the redwood stacked on that lower platform at the time of this fire?

A. No.

Q. What is the difference in height between the lower platform and the movable platform?

A. I don't remember exactly what it was.

Q. Approximately? A. I don't remember it.

Q. You can't determine it from looking at that photograph? A. I can make a guess.

Q. Approximately?

A. Being familiar with a sawmill I would say it was about three feet, possibly a little bit more. They were built in different heights.

Q. How much redwood did you put up on top of the movable platform?

A. That I don't know. I didn't put it there myself. It was moved over to make room for the truck that came in, and I don't remember how much was on it. I know there was a considerable amount on both ends on the platform and where the carriage runs up in front.

Q. Who moved it over there?

A. That I couldn't tell you.

Q. Was it an employee of the Eureka Lumber Company? A. I don't know.

Q. When was it moved over there?

A. That I can't remember the exact date. [131]

(Testimony of Hyrum Jensen.)

Q. With relation to the fire, the day before, a week? A. It was before the fire.

Q. The fire occurred on a Monday.

A. I said——

Q. About how long before the fire was it moved over?

A. I would say a month or six weeks, probably longer.

Q. Then the redwood material remained on the movable platform for at least a month or six weeks before this fire?

A. As far as I remember, yes.

Q. And you saw it there on several occasions, did you? A. Yes, I did.

Q. Can you give us an estimate of the amount that remained on top of there from a month to six weeks? A. No, I could not.

Q. Now, that photograph also shows the diesel motor which you referred to, does it not?

A. Yes, and the sawmill.

Mr. Castro: May we show this photograph to the Jury at this time, your Honor?

The Court: Very well.

Q. (By Mr. Castro): Is there any place that you had redwood moldings stored?

A. I have shown you on the map.

Q. Would you again point out if there is any other position——

The Court: It is getting a little repetitious now.

[132] You can ask him if there is any place in

(Testimony of Hyrum Jensen.)

addition to what he has pointed out. I am not going to have him go over it again.

Q. (By Mr. Castro): Is there any place you have not marked on the map where you say you had redwood molding?

A. I don't remember. I can't remember all the piles that was in it offhanded.

Q. Isn't it a fact there had never been any redwood molding stored along the west wall?

A. I didn't hear the question.

Q. Isn't it a fact that you did not have any molding stored along the west wall?

A. There was molding stored, but that was the molding that we moved over on the other side and put on the sawmill.

Q. Isn't it a fact that you did not have any molding stored at or in the center of the shed?

A. No, we had molding stored.

Q. Isn't it a fact that the only molding that you had stored in there was stored against the east partition?

A. We had molding stored where each place I showed you on that map.

Q. Did you have any molding stored in this northwest room? A. No.

Q. Did you have any molding stored in this southwest room? A. There could have been.

Q. What is your best recollection as to whether you had [133] redwood molding stored in that southwest room?

(Testimony of Hyrum Jensen.)

A. I think we had redwood door casings stored in there.

Q. I am talking about the molding.

A. I don't remember whether there was any molding in there or not. There was a considerable pile of redwood lumber dry in there.

Q. Will you look at your examination under oath at page 112 to the end of page 113. Will you read to yourself those questions and answers.

A. This whole thing?

Q. Yes.

(The witness read the portion indicated.)

Q. Have you read those questions and answers, Mr. Jensen? A. Yes, sir.

Q. And that refers to a diagram, does it not?

A. It has been so long ago I can't remember that. It has been a year and a half about.

Q. On October 12, 1956, did I ask you these questions and did you give these answers:

Mr. Hilger: At this time I will object to the use of this for any impeaching purposes on the grounds that there is no showing that there is any contradictory statement made in the portion that counsel has referred to compared to his testimony here.

The Court: I am afraid I would have to look at it [134] to rule on that objection. Have you a copy?

Mr. Hilger: I have a copy here beginning at Page 112. The Court is being supplied by other counsel.

(Testimony of Hyrum Jensen.)

The Court: I can't make it out. The witness is talking about "this" and "that."

Mr. Hilger: The record or sworn statement is so ambiguous I could hardly think it could be used for any purpose of stating designations as to locations. All it says on pages 112 and 113 is that the molding was stored on the west side of the partition, which is what his testimony has been.

Mr. Castro: And it was noted on the diagram in front of him where he was pointing to, and the diagram is part of that record.

Mr. Hilger: On the west side.

The Court: It is not very clear to me. I will allow him to read the questions. That is all you can do on impeachment anyhow. Maybe the Jury can make more out of that than I can. I will overrule the objection.

(Mr. Castro read the portion of the record as follows:)

"Q. Where were those redwood moldings and casings kept? A. In the building.

"Q. What part of the building?

"A. On the west side of the building where [135] the sawmill was back in there, then some was in the inside where the door frames and window frames and plywood and mica boards and like that.

"Mr. Castro: Do you have a stapler here?

"Unidentified Speaker: Yes.

"Mr. Castro: Do you want to make that No. 4?

"Mr. Hilger: What is that?

"Mr. Castro: Just a rough floor diagram.

(Testimony of Hyrum Jensen.)

"Mr. Jensen, this is a rough floor diagram. The portion closest to you represents the Third Street portion, that's the bottom of it. The portion to the right represents the Commercial Street, the railroad tracks would be to the top, behind. Now, as I understand it, the portion on the left here which would be the easterly half of the building, was the ground section a dirt section?

"A. Uh, huh, west, the west.

"Q. The west half would be the dirt section and the east would be the floor or improved section?

"A. That's right. This would be the improved. This was a floor where the door casings were and this would be where the molding was and the sawmill sawing boards up in here, motor sits here, the [136] lift truck here and moldings was all along here up to here and all here, the sawmill was there.

"Q. Now with reference—you pointed to the area where there was molding, this redwood molding, 66,000 board feet of redwood molding and window casings. Now I'll write down as you point—

"A. (Int'g.) Here, here and here.

"Q. Now were you pointing on the dirt side or the improved side?

"A. Here, here and here. This had a partition between here and the dirt side with the floor, that's where our door frames and plywood and mica and stuff like that was and some paint and shingles and tar paper and stuff like that.

(Testimony of Hyrum Jensen.)

“Q. On both sides of that partition then was molding mostly on this side?

“A. On the west side.

“Q. Indicating on the—mostly on the west side. Now did you have molding, this redwood molding any place else? A. No.”

Q. Were those questions and answers asked you?

A. Yes, they were and those are correct.

Q. And did I write down on the diagram where you were pointing to at the time I asked you those questions? [137]

A. I don't know whether you did or not. I don't think I have ever seen this before.

Q. You deny that you saw that diagram before?

A. I am not denying. I don't remember it.

Q. Do you remember a diagram being shown to you at the time I asked you those questions?

A. No, I do not.

Q. Do you deny that a diagram was shown to you at the time I asked you those questions?

A. No, I do not. I don't remember it.

Mr. Castro: At this time I ask that that diagram be marked with the original statement, your Honor, for identification.

The Court: It may be marked for identification.

The Witness: I would like to explain further.

The Court: Don't volunteer anything.

The Witness: I am sorry.

The Court: Just answer the questions.

(The diagram referred to was thereupon

(Testimony of Hyrum Jensen.)

marked Defendant's Exhibit E for identification.)

Q. (By Mr. Castro): You have referred to two electric motors being damaged in the fire. Where were they located at the time of the fire?

A. They were sitting on the north side of the building on top of some molding. [138]

Q. Whereabouts on the north side were they sitting?

A. I would say somewhere in this category.

Q. Would you put a mark down where you would recall them sitting?

A. I don't remember. It was in the north end.

Q. Can't you indicate on the diagram approximately where they were sitting?

A. Yes, I can. It would be in this—from here into there like. We set them on top of some molding.

Q. You are drawing a line commencing at a point that I asked to be marked X-8, running across to a point that I asked to be marked X-9. Is this the line that you drew in there?

A. Yes.

Q. How big were those electric motors?

A. I don't remember exactly. I think one was a 75 and the other was a 50. I am not sure about that. I don't remember. They were large motors. They were built to operate a large planer.

Q. And were they sitting on top of the redwood molding?

A. On some that was piled there, they were.

(Testimony of Hyrum Jensen.)

Q. How high were the stacks on which these two motors were sitting?

A. I can't remember how high they were.

Q. Can you tell us approximately?

A. No, I can't. [139]

Q. Can you tell us whether it was approximately waist level, shoulder or higher?

A. I don't remember, sir.

Q. Isn't it a fact that those motors were sitting on the ground?

A. They were after the fire, yes.

Q. And they were sitting in an upright position?

A. That I don't know. I know we had an electrician look at them.

Q. I ask you to look at Exhibit D. Do you see those two motors, Exhibit D?

A. No, I do not. They are not on there.

Q. Is this a motor? Do you recognize that as a motor?

A. I can't see good enough to tell you whether it is a motor or not.

Q. And do you see a light object a few feet from it? A. I can't say.

Q. Do those appear to be the motors which you had in the northeast corner of the building?

A. They were in the north corner.

Q. Were they in that northeast corner?

A. That I don't remember. They were in that area where we marked a cross there.

(Testimony of Hyrum Jensen.)

Q. You do not know whether this photograph shows those two or not? [140]

A. I do not. I can't see it. I think Mr. Hilger could enlighten me on that.

Q. Approximately how long had you had the 66,000 board feet of molding in the shed before the fire?

A. Well, I don't remember exactly, but some of it had been there for probably over two years.

Q. Would it have been there a month or six weeks before the fire? A. Yes.

Q. Would 66,000 board feet have been there longer than a month before the fire?

A. Not all of it, no.

Q. Say the month of June. Did you add any molding to the shed?

A. We added molding that we took out of the shed when we ran the truck in there, and after the sawmill or the truck was taken out, we brought some molding back from the outside yard and put in there.

Q. Was that additional molding to that which you had in the shed?

A. It was in the shed before we took it out. We rented the space for this man to build a portable sawmill.

Q. Did you add any new redwood molding during the month of June before this fire?

A. That I don't remember. [141]

Q. You have no recollection on the subject?

A. Not to be sure.

(Testimony of Hyrum Jensen.)

Q. What is your best recollection as to whether you did? A. I am not sure.

Q. Then the 66,000 board feet had been there at least a month before the fire?

A. I can't remember whether all of it was there or not. We was adding practically all the time.

Q. The 35,000 board feet of fence board, approximately how long had it been in the shed?

A. Some of it had been there quite awhile and some had been put in recently. Just when I can't remember.

Q. Was any put in during the month of June before the fire? A. That I can't remember.

Q. What is your best recollection?

A. I just don't remember.

Q. Would it have been there at least a month before the fire? A. I can't remember.

Q. Could it have been there at least a week before the fire? A. I can't remember.

Q. What was the cost of the fence boards, the wholesale cost?

A. That I don't remember. They were different prices.

Q. Those fence boards that you bought were rejects, weren't [142] they?

A. Some of them were and some of them were not. That was the way we conducted our business. We would buy a lower grade of lumber that had a ragged edge and so on, and we would trim it off and raise the grade up to a No. 1 board.

(Testimony of Hyrum Jensen.)

Q. How much did you have of reject lumber in that 35,000 board feet?

A. There was none.

Q. How much did you pay for reject fence board lumber?

Mr. Hilger: I will object to that as having no bearing on the value of the manufactured product. He has testified the value at the time of the fire, and that is the only material point here. What he paid for his raw material——

Mr. Castro: It is a question whether it has been remanufactured, your Honor. That is why I am asking the particular question.

The Court: That at least would be material. It is quite remote, Mr. Castro. I don't quite see the materiality.

Mr. Castro: Reject lumber has one value.

The Court: I understand that.

Mr. Castro: Remanufactured lumber has another value. There will be evidence as to the condition of the material, whether it was reject or remanufactured.

The Court: If you will present evidence and lay the foundation for it it may be material. [143]

Mr. Castro: That is what I am doing.

The Court: You might ask him what a typewriter cost. It has no relationship to the claim.

Mr. Castro: I am laying the foundation for the testimony which is going to be offered in that regard.

The Court: To save time I will allow it.

(Testimony of Hyrum Jensen.)

The Court: Do you know what you paid for the reject lumber before you remanufactured it?

A. Yes, we paid all the way from \$20 and some as high as \$50.

Q. A what?

A. A thousand. May I explain the thousand feet was figured on the basis of a half inch, and therefore a thousand feet of half inch would tally twice as much as that height would if it would be a full inch. That is why it didn't take up but very little space.

Q. (By Mr. Castro): I am going to ask you to look at your examination under oath at page 115 commencing at line 8 to line 12. I believe that covers the subject there. Have you read those questions and answers? A. Yes, I did.

Q. At the time of the examination under oath did I ask you these questions and did you give these answers:

"Q. Now, how did you determine the price at \$85 a thousand?

"A. That's what we sold them for. [144]

"Q. How much did they cost you?

"A. I don't remember."

Did you give those answers to those questions?

A. I don't remember exactly.

The Court: He just asked you if you gave those answers.

The Witness: Yes, I gave those answers.

The Court: I will sustain the objection on the

(Testimony of Hyrum Jensen.)

ground that it is not proper cross-examination. I do not see anything conflicting in the statement.

Mr. Castro: He said the price was \$20 to \$50.

The Court: That is what he said. He said he didn't remember at the time of the examination, and he has testified now. There is no conflict.

Mr. Hilger: Besides, what is the cost of a manufactured item——

The Court: I will sustain the objection.

Q. (By Mr. Castro): Did you refresh your memory concerning the cost of any of the fence boards that you bought?

A. Repeat, please.

Q. Did you refresh your memory concerning the cost of any of the fence boards that you bought?

A. Well, not now I didn't, no.

Q. In your proof of loss you have listed certain pine moldings and door casings. Where were they kept? [145]

A. The molding and door casing?

Q. Pine molding and door casing?

A. May I show you on the map?

Q. If you please. Mark it.

A. This is our store building here, and we had a storehouse where we kept doors, windows and high-priced molding which was of a pine variety, which costs more than redwood or any other kind. There was molding in there, door cases, and a general line of building material, and so on.

Mr. Castro: May we mark that room "North-east room," your Honor.

(Testimony of Hyrum Jensen.)

Q. How was the pine molding stored in there?
Was it stacked?

A. No, it was done up in bundles. It ran from 10 to 20 feet long, and it was wrapped in, I think, 50 in a bundle.

Q. Was it laid on the floor?

A. Yes, it was.

Q. Was that molding burned in the fire?

A. No, it was not.

Q. Was that molding damaged in the fire?

A. It was damaged, yes.

Q. Could you describe the amount of damage to that molding?

A. No, I could not. It was black and wet.

Q. Could that molding have been salvaged?

A. Some of it I think could have been. [146]

Q. Approximately how much?

A. I don't know. I didn't look at it.

Q. Approximately how much molding did you have in that room?

A. That I can't remember. It was on a special order.

Q. You bought it specially?

A. Yes, we had.

Q. How much had you bought specially?

A. I beg your pardon?

Q. How much had you bought specially?

A. I don't remember how much it was. I hadn't looked at the invoices.

Q. Approximately how long before the fire would you say you bought that specially?

(Testimony of Hyrum Jensen.)

A. That I can't remember exact.

Q. What had you paid for it?

A. I never looked at an invoice. That was my son's job.

Q. I will show you a photograph taken on August 10th, 1956. Do you recognize the contents of that photograph? A. Yes, I do.

Q. Is that a photograph of that northeast room?

A. Yes, sir.

Q. Is that the condition as it was following the fire? A. That I couldn't say.

Q. Does that show any of this molding that you have referred to? [147]

A. No, it does not. It is back of the windows and plywood that is laying there, back over in this part.

Q. Would you indicate with your pen where you say that pine molding was?

A. I can see a small end of it right here.

Mr. Castro: I will mark that X-1. We will offer that photograph in evidence as Defendant's exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Castro): What is that material which is tied up with string on the left-hand side of that photograph?

A. That is ready-made door casings and window casings.

Q. That was tied with string, and what was it?

(Testimony of Hyrum Jensen.)

A. I think that was tied with wire, if I remember right. I am not sure.

Q. On the right-hand side of the picture there are stacks of doors? A. Yes.

Q. And at the back of the picture it is a photograph or a picture of some type?

A. No, that was a medicine cabinet, mirror.

Mr. Castro: May I show this to the Jury at this time, your Honor?

(Defendants' Exhibit F was passed to the Jury.) [148]

Q. (By Mr. Castro): After the fire were any of those doors sold? A. Yes.

Q. To whom were they sold?

A. Rice Supply.

Q. How many of those doors did you sell to the Rice Supply?

A. Twelve, I believe. They were not sold. He borrowed them.

Q. Rice Supply Company was one of your creditors, was it not? A. Yes, sir.

Q. And you owed them approximately \$1,300 at the time of this fire, did you not?

A. That I don't remember.

Q. You were indebted to them at the time of this fire, weren't you? A. Yes, sir, we were.

Q. Those twelve doors were turned in to Rice Supply Company?

A. They were. He just borrowed them. They were not credited or anything. They never have been.

(Testimony of Hyrum Jensen.)

Q. Have they returned them to you?

A. No, sir.

Q. Did they also pick up twelve doorjambs or door frames? A. Not that I know of.

Q. Did you sell any of those doors to anybody else? [149] A. Not that I remember of.

Q. Did you send in an order of doors to McKinleyville? A. No.

Q. Are you acquainted with a man by the name of Don Wilson? A. That I don't remember.

Q. Did you have an employee by the name of Don Wilson? A. Yes.

Q. Was he employed by you after the fire?

A. I can't remember whether he was or not. I believe he was for a few days.

Q. Was he employed by you before the fire?

A. Yes.

Q. Did you send him to McKinleyville with doors, toilets and plywood?

A. I don't remember. I had a stack of door supplies that was out to my house. I have a large garage out there, and I have a good stack of building material out there. He may have taken some doors out from that stock. I am not sure.

Q. Did he take any doors out of the stock which is shown in the photograph? A. Did I what?

Q. Did he take any doors out of the stock which is shown in the photograph?

A. Not that I remember. If he did he was not instructed to.

Q. At the time of the fire or the day of the fire

(Testimony of Hyrum Jensen.)

was any [150] material, merchandise, removed from the building? A. I believe there was.

Q. Did you remove it? A. No.

Q. Was it placed on your pickup truck?

A. No, not that I know of, unless somebody else did, I didn't do it.

Q. What material or merchandise did you see being removed on the day of the fire?

A. I don't know. I didn't see any of it moved. I heard there was some moved over to Lewis H. Hess & Company across the street that somebody had tried to save.

Q. You had a pickup truck, Eureka Lumber Company had a pickup truck, didn't it, on the day of the fire?

A. We had a pickup truck, yes.

Q. And Harold Dee Jensen was using it on the day of the fire, wasn't he?

A. That I don't know.

Q. Did you see him use it on the day of the fire? A. I am not sure.

Q. Was the merchandise which was taken out after the fire placed on that pickup truck?

A. I don't know. I never seen any.

Q. Did you have a foreman at the Eureka Lumber Company? A. Yes. [151]

Q. What was his name?

A. At the time of the fire we didn't have a foreman. We had one prior to the fire, about a month before.

Q. What was his name?

(Testimony of Hyrum Jensen.)

A. John Roberts, I believe, probably two months before the fire.

Q. You did not have a foreman for two months before the fire?

A. No, I don't believe we did. Mr. Jensen, Andrew Jensen, sometimes if I would leave, he would probably act as manufacturing the lumber, to see it was run through the saw properly and so on, lathe or whatever we were cutting, fence, molding.

Q. Was Andrew Jensen working as a foreman for two months before the fire?

A. I don't believe he was.

Q. Was Andrew Jensen working for you during the month of June, 1956, the month of the fire?

A. I can't remember the dates that he was working for us. He did work for us, however. He worked for us a couple of years ago and later he came back, but I don't recall now.

Q. Following the fire did you contact Mr. John Roberts? A. No, sir.

Q. Did Mr. John Roberts make his home in the City of Eureka at the time of the fire?

A. I don't think he does. [152]

Q. On the afternoon following the fire did you telephone Mr. John Roberts?

A. No, sir, I did not.

Q. Did you ask Mr. Roberts to come down to the Eureka Lumber Company, that you wanted to talk to him?

Mr. Hilger: I will object to what he might have

(Testimony of Hyrum Jensen.)

asked in a conversation he has already denied took place.

The Court: You will have to lay the foundation for it in some way.

Mr. Castro: That is what I am trying to do.

Mr. Hilger: He has denied the existence of the conversation, and to ask what he might have said at that conversation is improper.

The Court: I think counsel may have the right, if he wants to produce—I do not know what the materiality of it is, but if he wanted to produce a witness by the name of Roberts to state something to the contrary to what this witness said, it may be proper for him to lay the foundation. I will allow the question. I don't think you had finished.

Mr. Castro: May we have the question read?

(Question read.)

Q. (By Mr. Castro): ——to Mr. Roberts the afternoon following the fire?

A. No, sir, I did not.

Q. The afternoon following the fire did Mr. John Roberts [153] and his wife meet you at the Eureka Lumber Company?

A. I believe they came down. I owed him some money for wages when he was working before, that he said he didn't need, and for me to keep it until he needed it.

Q. How much did you owe Mr. John Roberts?

A. I don't remember exactly.

Q. But you do recall you talked to him about

(Testimony of Hyrum Jensen.)

the wages you owed him on the afternoon following the fire?

A. I don't remember what day it was. I think he came down to tell us how sorry he was a few days after. I don't know how long it was.

Q. On the afternoon following the fire did you ask Mr. Roberts if he could give you an estimate as to how much lumber was in that shed portion of your building?

A. No, sir, I did not, at no time.

The Court: I think we will take the morning recess at this time.

(Recess.)

Q. (By Mr. Castro): Mr. Jensen, in the proof of loss you attached a five-page statement referring to certain merchandise. Do you recall that?

A. Yes.

Q. At page 2 you have a heading called "Plumbing." A. Yes.

Q. And then a series of items running through that page [154] over to page 3, down to the item 6, half-inch 45 degree L's. A. Yes.

Q. Where were those items kept on the premises?

A. They were kept in a bin in the storehouse.

Q. Which room is the storehouse?

A. This was the store.

Q. Where was the bin located?

A. Over on this side where we kept the nails, pipe fittings and so on.

(Testimony of Hyrum Jensen.)

Q. That would be along the east side of the storeroom? A. Yes, sir.

Q. Were those metal parts that are listed there under plumbing damaged in this fire?

A. Not so much.

Q. Did you check to see whether any of those metal parts, such as piping and things of that nature, were usable after the fire or salable?

A. I think they could have been used.

Q. Then those items were not totally lost as they are represented to be in the proof of loss?

Mr. Hilger: I object to that. They are not represented to be totally lost. It says "Items partially destroyed or damaged by fire." The document speaks for itself.

The Court: I will sustain the objection. The question is argumentative. [155]

Q. (By Mr. Castro): With reference to the object called a planer that you referred to in the proof of loss at page 5, I believe——

A. We never listed any planer.

Q. Sets of planer heads. A. Yes.

Q. And planer knives? A. Yes.

Q. Where were they kept?

A. They were somewhere in the storeroom.

Q. Would you indicate where in the storeroom they were kept?

A. That would be impossible for me to tell, because I didn't go in there often enough. I believe I could give you an idea about where they were kept. I think they were right back of the office

(Testimony of Hyrum Jensen.)

here, right in a little cove we had in there, a cupboard with a couple of shelves. It was on top.

Q. Were those planer heads or knives damaged in the fire? A. I think they were, yes.

Q. Are they metal parts?

A. Yes, they were metal.

Q. What was the damage to them?

A. That I don't know.

Q. Did you inspect them after the fire?

A. No, I did not.

Q. Did you see them after the fire? [156]

A. That I can't remember.

Q. I will show you a photograph taken also on August 10th, 1956. Does that show the office section? A. Yes, it does.

Q. Does that show the shelving area that you have referred to along the west wall of the office?

A. No, it does not.

Q. Does it show a paint mixer?

A. Yes, it does.

Q. Where were the planer knives and heads with reference to that paint mixer?

A. I think they were in between this paint mixer and back up in this far corner. I am not sure where they were, but I have a slight recollection that they were in there.

Mr. Castro: May we offer this photograph in evidence as Defendant's exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit G.)

(Testimony of Hyrum Jensen.)

Q. Was that paint mixer damaged in this fire?

A. I never examined it too closely. I know it was all wet with water. I would say it was damaged.

Q. Was it repairable?

A. That I don't know.

Mr. Castro: May we show that photograph to the Jury?

The Court: While the Jury is looking at that [157] picture we will interrupt the proceedings and take the report of the Grand Jury.

(After the report of the Grand Jury the trial continued:)

Q. Did you have any planer in the building at the time of the fire? A. No.

Q. Do you know when you had obtained the planer head and knives? A. Not exactly.

Q. Do you know from whom you obtained the planer head and knives?

A. No, I do not.

Q. Can you state approximately when?

A. I would make a guess. A month or so before.

Q. And you can't identify the seller?

A. No, I can't.

Q. Was it Hill & Norton?

A. That we were selling to?

Q. That you were buying the knives and heads from? A. No.

Q. Did Hill & Norton, Incorporated, sell you a planer? A. Yes.

Q. Where was it at the time of the fire?

(Testimony of Hyrum Jensen.)

A. Out in the east yard. [158]

Q. Were the knives and heads part of that equipment? A. No.

Q. Now, the two electrical motors that you have referred to, from whom did you obtain their possession?

A. I think they came from Hill & Norton.

Q. Did you have those motors up for sale?

A. Yes, we did.

Q. Do you know what the asking price for them was? A. No, I don't, not exactly.

Q. Isn't it a fact that Hill & Norton had not sold those materials to you at the time of this fire?

A. They had sold them to us. We were going to trade them lumber for the planer.

Q. Did you notify Hill & Norton of the fire and the damage to those two motors?

A. They were there the next day, Mr. Hill—Bert Gilbert. I beg your pardon.

Q. Is there some name you wish to change?

A. Bert Gilbert.

Q. Was Mr. Gilbert a representative of Hill & Norton, Inc.? A. He did represent them, yes.

Q. Did Mr. Gilbert tell you that Hill & Norton, Inc., were going to present a claim to their own insurance carrier for the damage to those two motors?

A. They didn't tell me, no. [159]

Q. Do you know whether or not Hill & Norton, Inc., did present a claim? A. I do not.

Mr. Hilger: I object to that as immaterial, incompetent and irrelevant as to any issue raised in this proceeding. He had no control over what Hill

(Testimony of Hyrum Jensen.)

& Norton did. He testified he has no information on it.

Mr. Castro: Paragraph 8 of the building endorsement, your Honor, has the express provision.

The Court: Paragraph 8?

Mr. Castro: Paragraph 8 of the building endorsement has an express provision on it.

The Court: In respect of that, the witness says he has no knowledge of it. Doesn't that dispose of it?

Q. (By Mr. Castro): Don't you know that Hill & Norton have been paid in full by their own insurance carrier for those two motors?

A. No, sir, I never heard tell of it. They were our motors.

Q. With reference to the plywood you are claiming, you were buying reject plywood, weren't you?

A. Reject, yes, interior and exterior.

Q. How much of the reject plywood was involved in this fire?

A. The last I remember there was something like 3500 feet, [160] if I remember right.

Q. Of reject in the fire?

A. That was plywood.

Q. Plywood reject?

A. I don't know whether it was all rejects. I doubt it very much. It would be different types.

Q. Approximately how much of it was——

A. That I couldn't say.

Q. With reference to the sawmill, when did you acquire the sawmill?

(Testimony of Hyrum Jensen.)

A. We built it right there in the yard, in the building.

Q. When did you start the building?

A. Probably a year before the fire.

Q. Where did you get the diesel motor?

A. I think from J. & W.

Q. J. & W. who?

A. Lumber Company.

Q. What did you pay for that motor?

A. That I don't know.

Mr. Hilger: I object to that as incompetent, irrelevant and immaterial. The sawmill has been sold, and the sale price is the only value to be considered in this proceeding under the terms of the policy. Inventory sold but not delivered shall be valued at the sale price thereof, and likewise, even without that provision, what he paid for an [161] individual component would have nothing to do with the value.

The Court: We might be here for a long time if the insurance company was going to conduct an examination as to what he paid for every part of a completed piece of equipment. Do you intend to go into that?

Mr. Castro: I am talking about a large motor, your Honor, which is a main component of this sawmill.

Mr. Hilger: Under the terms of the policy it is immaterial. The evidence is the thing has been sold but remained undelivered, and the policy specifically provides as to inventory sold but not deliv-

(Testimony of Hyrum Jensen.)

ered; the only measure of value is the sale price thereof.

The Court: I am inclined to think your opponent is right about that Mr. Castro. Of course, you have a perfect right to cross-examine as to the facts concerning the value of the sawmill and the facts as to whether or not it was sold, how much and to whom and circumstances like that, but I think the inquiry you now pursue is immaterial. I will sustain the objection.

Q. (By Mr. Castro): Where did you acquire the carriage for the sawmill? A. The carriage?

Q. Yes.

A. That I don't know. I think that was from J. & W. also.

Q. Where did you acquire the feed works for the sawmill? [162]

A. That I don't know.

Q. On the transaction that you have described with Dayton Murray Truck Company, didn't you execute a written contract with the finance company of the General Motors Acceptance Corporation?

A. Did I furnish——

Q. Did you execute or sign a contract with that finance company? A. Yes.

Q. And all the credit which was given on that sawmill was \$4,000, wasn't it?

Mr. Hilger: I object to that. The document would be the best evidence of what it shows.

The Court: Sustained.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): Did you personally negotiate with Dayton Murray Truck Company for the purchase of the truck? A. No, sir.

Q. Or for the trade of the sawmill?

A. No, sir.

Q. After the fire did you make any determination whether the sawmill was repairable?

A. We decided it was not repairable.

Q. Did you make a check to see if it was repairable?

A. I think the Dayton Murray representative came over immediately afterwards. [163]

Q. Did you make any check to see whether it was—— A. Yes, I looked at it.

Q. Did you reach any conclusion as to whether it was repairable?

A. I would say it was not repairable.

Q. There was some salvage in the sawmill, wasn't there?

A. I don't think there would be any. The heat had warped all the cast iron and steel that was in the sawmill.

Q. Was there any salvage in the motor block?

A. That I don't know.

Q. Weren't you advised that there was salvage in the motor block?

A. No, I was advised that there was not, as far as that goes.

Q. Didn't Bud Hall advise you that there was salvage?

A. I don't think he ever did. I am not too

(Testimony of Hyrum Jensen.)

familiar with details. There could be salvage in it. I don't know. But for me looking at it there is no salvage in it.

Q. Will you look at your examination under oath at page 110, commencing at line 4.

The Court: How is that material to the case?

Mr. Castro: The cost of repair is an offset in the value of the article.

The Court: Isn't that something for the insurance company to take care of? [164]

Mr. Castro: No, the insurance company does not under the policy take the salvage.

Mr. Hilger: Under the terms of this particular policy salvage is, I submit, absolutely immaterial as to an item that has been sold but remained undelivered. The policy specifically says the loss will be the sale price of \$7500 in this particular instance. Salvage, I submit, is immaterial as to this particular item.

The Court: That was what I was wondering about. I do not see what materiality salvage has.

Mr. Castro: If a man sells an article for X dollars and there is a fire, and after the fire it is X dollars minus a hundred, their damage is only that difference, is it not, your Honor?

The Court: The value of the property at the time I think would be the test, but I do not know what you mean when you talk about salvage. That is a different matter, isn't it?

Mr. Castro: When you have an automobile accident, your Honor, you will take it to have it re-

(Testimony of Hyrum Jensen.)

paired. You determine whether it is worth having repaired or whether you will take the amount that is paid for the car in its then condition, and its then condition would represent the salvage.

The Court: The man who takes the insurance out, who insures for the value of the thing, it is its value after [165] it is damaged that counts, isn't it?

Mr. Castro: Yes, and that is what salvage enters into it.

The Court: I do not see the pertinency of your questions here, whether somebody told him there was some salvage in it.

Mr. Castro: Number 1, he has denied there was any salvage in it, and then I asked him the specific question if a man did not so advise him.

The Court: That would be all hearsay.

Mr. Castro: It is not hearsay as to this man. He was present at the time of the conversation.

The Court: It is hearsay as far as the issue is concerned. The fact that someone may or may not have told him whether there was some salvage in it would be immaterial. The question is still what is the value of it.

Mr. Hilger: This man has already testified to his conclusion that it had no salvage.

The Court: I do not see the pertinency of the cross examination.

Mr. Castro: I will withdraw that.

Q. Was that a Cummings diesel motor?

A. Yes, it was.

Q. Did you have the Cummings diesel motor

(Testimony of Hyrum Jensen.)

people come and examine that engine after the fire?

A. No.

Q. Did the Cummings diesel motor people come and examine that engine after the fire?

A. No, not that I know of.

Q. Did Bud Hall of the Cummings Diesel Company come and examine that motor after the fire?

Mr. Hilger: It assumes a fact not in evidence. There has been nothing here to identify Bud Hall.

Q. (By Mr. Castro): Did you have any mechanic examine that engine after the fire?

A. Not to my knowledge.

Q. Did you have Bud Hall examine that engine after the fire? A. No, I did not.

Q. Will you look at your examination under oath at page 110, lines 4 to 17. Read those questions and answers, please.

(The witness perused the transcript referred to.)

Q. Have you read those questions and answers?

A. Yes.

Q. On October 12, 1956, did I ask you in the examination the following questions:

“Q. You haven’t checked it over to determine whether or not it’s repairable?

“A. But your insurance men have.

“Q. I’m asking whether you did. [167]

“A. No.

“Q. Or did you have anybody check it over?

“A. Yes.

“Q. Who did you have check it over?

(Testimony of Hyrum Jensen.)

"A. Oh, a couple of mechanics.

"Q. Who are they?

"A. Bud Hall for one.

"Q. Anybody else?

"A. I think some Cummings engineer checked it over. I think one of them said there was a little salvage in the block of the motor.

"Q. Who was the Cummings engineer?

"A. I don't know who he was."

Q. Were those questions asked and those answers given? A. I will explain.

Q. First, were those questions asked you and did you give those answers?

A. I would like to tell you how that happened, first.

The Court: He wants to know——

The Witness: I would say that is correct.

Q. (By Mr. Castro): Now, after that examination under oath this document was submitted to you which is Exhibit E, was it not?

A. I don't know.

Q. Turning to page 158 of that document, does that page [168] bear your signature?

A. Yes, it does.

Q. Where did you sign that document?

The Court: This is wasteful and time-consuming. You have already established the fact that he gave certain answers to certain questions. What is the next question?

Q. (By Mr. Castro): And you executed this document——

(Testimony of Hyrum Jensen.)

The Court: Counsel, he has answered the question. You don't have to go into that any further. He said he did.

Mr. Hilger: We will stipulate.

Q. (By Mr. Castro): Yesterday you identified certain financial statements. You had given those statements to the Crocker Anglo Bank.

A. My son had, yes.

Q. Did you authorize your son to give them to the bank? A. Yes, sir.

Q. Who prepared those financial statements?

A. Our bookkeeper.

Q. Who was your bookkeeper?

A. Ellen Van Harpen was. I think she was the bookkeeper at that time, yes.

Q. Referring to Plaintiff's Exhibit No. 17, the financial statement at the close of business in December, 1954, who prepared that one?

A. I imagine my son and one of our bookkeepers. I believe [169] we had Mrs. Thrasher at that time.

Q. I will show you Exhibit 18, which is the financial statement as of the end of business on May 31st 1956. Who prepared that one?

A. I think that must have been my son and Mrs. Van Harpen.

Q. Referring to Exhibit 18, that is a false document, is it not?

A. I would like to have you explain to me which is 18.

Q. That is the one which is numbered 18, the one as of June 1, 1956.

(Testimony of Hyrum Jensen.)

A. I would say it was not a false document.

Q. You went through it thoroughly before you signed it?

A. I hired my son for that, and he was well capable of it, and anything he asked me to sign I would sign it.

Q. And you read it over before you signed it?

A. No, I never did read it over.

Q. Did you read it over before you testified in this Courtroom yesterday that all the facts therein were true except a piece of property at fresh water?

A. I have always taken my son's word for it, and everything he told me I found to be true.

Mr. Castro: I move to strike that as not responsive to the question.

The Court: He asked you whether you read it over.

A. No. [170]

Q. (By Mr. Castro): Did you personally own the property which is listed as being at Ogden, Utah? A. No. My wife did.

Q. As of June 1—

Mr. Hilger: What was that answer?

The Court: He said his wife did.

Q. (By Mr. Castro): Did you have any record title in that property?

A. I have never had any record title in it.

Q. That has been your wife's separate property during your entire marriage life, has it not?

A. Yes.

Q. Under "mortgages on real estate" you have

(Testimony of Hyrum Jensen.)

listed the amount of money that you owed Mr. Abrahamsen as of June, 1956?

A. If it is on there I had.

Q. It does not appear to be on there.

A. In what month?

Q. The month for which that is given, June 1, 1956.

A. I don't believe I owed him any money at that time.

Q. Didn't you owe Mr. G. Abrahamsen a sum in excess of \$13,000 on a second deed of trust in June, the first of June, 1956?

Mr. Hilger: To shorten this, there is a deed of trust in the amount of \$19,600 as shown on this balance sheet that is payable to Alfred Leen. [171] That might help to move things along.

The Court: If that is the same item——

Mr. Hilger: I believe it to be.

Q. (By Mr. Castro): Did you execute a note to Mr. Leen? A. No, sir.

Q. Did you execute a deed of trust to Mr. Leen?

A. No, I don't think I did.

Q. You executed a note to Mr. Abrahamsen, didn't you?

Mr. Hilger: I will object to that. If there is a note and deed of trust, the contents of which are being discussed, I think the notes and deed of trust would be the best evidence of what they contain. All sorts of confusion could grow out of something like this.

(Testimony of Hyrum Jensen.)

Mr. Castro: There is no confusion. It is in black and white.

Mr. Hilger: Then I will renew my objection that as to any document referred to the document itself is the best evidence.

The Court: I will sustain the objection. I am not going to spend a lot of time on something that may make for confusion if there are documents that show exactly what happened.

Q. (By Mr. Castro): Under Schedule 1, referring to insurance, you represented to the bank that you had \$155,000 worth of fire insurance on the building. Do you see that?

A. I never prepared this. I don't know whether that is [172] true or false.

Q. That is what that statement contains, is it not?

A. I would like to ask my counsel, Mr. Hilger, if that is correct.

The Court: You do not know?

A. I don't know.

Q. (By Mr. Castro): Did you have \$155,000 fire insurance on any buildings on June 1, 1956?

A. I don't know.

Mr. Hilger: There is nothing on there that restricts it to one building. There are several buildings.

Q. (By Mr. Castro): Did you have several buildings which would have total fire insurance of \$155,000 as of June?

A. I don't know. I never kept track of it.

(Testimony of Hyrum Jensen.)

Q. This profit and loss statement asks you to set forth the amount of merchandise which you had as of June 1, 1956, did it not?

The Court: That calls for something that is in the document, doesn't it?

Mr. Castro: I am refreshing his memory and asking a question about it.

The Court: I am doubtful as to the materiality. What has this got to do with how much money the insurance company owes on the fire?

Mr. Castro: Right now he is asking for 101,000 [173] board feet of lumber which is involved in that particular statement, your Honor.

The Court: Yes, but you asked him about some profit and loss statement and mortgages.

Mr. Hilger: We will stipulate that as of June 1, 1956, this Acceptance sheet showed \$28,000 in inventory in the building.

Q. (By Mr. Castro): What part of that inventory was in inventory which was being processed?

A. That was in the building.

Q. And you had \$9,000 in round figures of being processed in the building June 1, 1956?

A. That I don't know. I know we did a lot of remolding stock and everything in the building.

Q. Did you have \$18,280 of finished merchandise as of June 1, 1956?

A. We had a lot of stock in there and these figures show that we must have had it.

Q. And those are figures that were put there by your son Harold Dee?

(Testimony of Hyrum Jensen.)

A. Harold Dee and our bookkeeper. I think our bookkeeper put those figures there.

Q. Do you know whether or not your bookkeeper put those figures there?

A. No, sir, I do not. [174]

Q. How much merchandise did you buy after June 1 up to the time of the fire, June 25th?

A. I don't know.

Q. Approximately? A. I don't know.

Q. Did you buy any merchandise after you gave that financial statement up to the time of the fire?

A. I don't know.

Mr. Castro: Counsel, do you have a copy of his 1955 tax return?

Mr. Hilger: I have only a copy that is unsigned, unexecuted, of his State return.

Q. (By Mr. Castro): With reference to that financial [175] statement, Exhibit 18, didn't you have notes payable of more than \$5,000 at the time you gave this financial statement on June 1, 1956?

A. To whom?

Q. To anybody.

A. I might have. I owed money.

Q. The financial statement states that you owed a note to the bank for \$5,000.

A. That was business money, yes.

Q. Did you owe other notes?

A. I may have.

Q. Under the paragraph of "Other notes payable" it was [175] left blank. How much did you owe on other notes? A. I don't know.

(Testimony of Hyrum Jensen.)

Q. How much did you owe in accounts payable as of June 1, 1956? A. That we owed?

Q. Yes. A. I don't know.

Q. Exhibit 8 says "Accounts Payable past due \$3,500." A. That is probably what it was.

Q. Didn't you owe substantially more than \$3,500?

A. That I couldn't tell you. I didn't keep the books. I never did. My son was hired to do that and that was his job. And I could say every time we furnished a financial statement the bank sent a man down to look it over, and they always okayed it.

Mr. Castro: I move to strike that as not responsive to the question.

The Court: What was the question?

Mr. Castro: I asked him if he owed substantially in excess of \$3,500 on accounts payable as of the date he gave this statement.

The Court: That is only partly responsive.

A. I don't know.

The Court: I will allow it to stand. You can ask him some more questions. [176]

Q. (By Mr. Castro): Did your accounts payable increase between June 1 and the date of the fire on the 25th? A. Did what?

Q. Did your accounts payable increase between June 1 up to the time of the fire?

A. I don't know.

Q. Did they decrease?

A. I don't know. I never kept the books at any time.

(Testimony of Hyrum Jensen.)

Q. Wasn't your bank account closed out between June 1 and June 25?

A. The bank account was closed out on the 22nd of June.

Q. Was that closed out by an attachment?

A. Yes, it was.

Q. How much was the attachment?

A. That I don't remember.

Q. Did you reopen that bank account after June 21 up to the time of the fire? A. No.

Q. As of the first of 1956 did you take an inventory of your merchandise and stock in this building? A. I imagine they did.

Q. Is the closing inventory figure given in Exhibit 18, \$15,478.11, the inventory as it was actually taken?

A. The bookkeeper and our son okayed it and put it there; I would say yes. [177]

Q. To your knowledge was there any additional inventory there?

A. I always had my son take care of the books.

Q. To your knowledge was there any additional inventory at the time referred to?

Mr. Hilger: To what date are we now referring?

Mr. Castro: Referring to Exhibit 18, which was the proof of loss on June 1, 1956, containing a statement fixing an inventory of \$15,478.11.

Mr. Hilger: I doubt if any proof of loss was filed on the date given, counsel.

Mr. Castro: I am not talking about a proof of loss.

(Testimony of Hyrum Jensen.)

Mr. Hilger: You stated proof of loss. You may not have meant it.

Mr. Castro: Profit and loss statement.

Mr. Hilger: I am going to object to that as being too remote from the date of June 5, 1956, as to what might or might not have been in there. We have gone back to December 31, 1955, which is six-and-a-half months prior to the fire, and what inventory was there on that date has absolutely no connection.

The Court: Is that what you are reading from, a profit and loss statement for 1955?

Mr. Castro: June 1, 1956, to which is attached a profit and loss statement dated December 31, 1955.

The Court: Then it is a profit and loss statement for 1955 that you are referring to.

Mr. Castro: No, I am referring to a profit and loss statement which is Exhibit 18, which was under date of June 1, 1956, and attached to it on the inside is a profit and loss statement reflecting the inventory as of the close of business in 1955.

Mr. Hilger: And the specific question has to do with the inventory of December 31, 1955, which I submit is too remote in time to have anything to do with the existence or non-existence of an inventory on June 25, 1956.

The Court: I think the objection is good. Mr. Castro, before we recess, I do not quite understand what the financial condition of this plaintiff has to do with the claim of fire loss.

Mr. Castro: We are offering evidence of financial condition relating to motive.

(Testimony of Hyrum Jensen.)

The Court: Relating to what?

Mr. Castro: Motive.

The Court: Then I will sustain your objection until you lay some foundation for it. You mean motive in connection with the charge of arson?

Mr. Castro: That is correct.

The Court: I think in the interest of justice the Court should require some preliminary foundation before permitting that sort of cross examination. I am overruling the [179] objection without prejudice to your renewing this examination in the event that there is some further foundation laid.

Mr. Castro: I understood you were sustaining it.

The Court: I am sustaining the objection without prejudice to your renewing the examination at a later time.

Mr. Castro: Thank you.

The Court: I think I interrupted you.

Q. (By Mr. Castro): Did you receive the original of the letter dated October 8, 1956, addressed to you and Dee Jensen?

A. Did I receive a letter?

Q. Yes. A. No.

Q. Did Mr. Frederick Hilger give you such a letter telling you you had to appear for examination on October 12? A. I don't remember.

Mr. Hilger: We will stipulate that the letter was sent and received.

Mr. Castro: Do you have that letter?

Mr. Hilger: I have the letter.

(Testimony of Hyrum Jensen.)

Mr. Castro: May we offer this in evidence at this time as Defendant's next in order?

The Court: Any objection?

Mr. Hilger: No objection.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit H.) [180]

Q. (By Mr. Castro): In that letter I asked you to produce all documents relating to and establishing the title of the property, including the books of account, bills, invoices and other vouchers or certified copies thereof, if originals be lost, covering all the property described in the proofs of loss theretofore filed by you. Do you recall that?

A. No, I never. Why should I do that, because you had access to all the records at all times down at the buildings. The doors were burned down, and I was refused to take them out, and the insurance men were going over them real often.

Mr. Castro: I move to strike that as not responsive to the question.

Mr. Hilger: I think the witness is confused about the subject matter of this letter. The record reveals about August 8th——

Mr. Castro: I would like the ruling, your Honor, on my motion.

The Court: You have me confused, too. All this seems to me to be somewhat immaterial and time-consuming.

Mr. Castro: This is the basis for the invoices which have been requested.

(Testimony of Hyrum Jensen.)

The Court: The letter has been received in evidence. Now what do you want from the witness?

Q. (By Mr. Castro): Did you produce any of the invoices that we asked to have produced in the letter of October 8, 1956? [181]

A. I had a request from Mr. Hilger—I don't remember what time it was—to go down and pick up all the invoices and everything I could find in the building, and they were scattered from the office back all over, and I did pick up everything that I could find that had any writing on, and brought them up to Mr. Hilger's office.

Q. Thereafter were you told that there were no records relating to sales to you of merchandise during 1956 found?

A. No, I didn't talk to anybody about it.

Q. You had no conversation after you took the records to Mr. Hilger's office?

A. He asked me if that was all, and I said yes, all I could pick up. The biggest part of them was rotted and wet.

Q. After that they were brought to the office, and didn't you receive a notice requiring the production of invoices for purchases during 1956?

A. No, I did not.

Q. Didn't Mr. Hilger tell you that you were to produce invoices for purchases during 1956?

A. Yes, sir, he did. That is what I went down and picked up.

Q. Did you produce any invoices for purchases during the year 1956?

(Testimony of Hyrum Jensen.)

A. I don't know. They are all in——

The Court: Let me shorten this. I think I see what [182] counsel is getting at.

Q. Did you, after your lawyer told you, and you went down and handed up your records——

A. I did.

Q. ——did you turn over all of the records you could find? A. Yes.

Q. Were there any records that you found that you did not turn over?

A. No, sir, there was none that I knew of.

Q. Did your lawyer tell you there were not any invoices for 1956 in the records which you turned over? A. No, I don't believe he did.

Q. (By Mr. Castro): Did your lawyer ever ask you to get copies of sales invoices for 1956?

A. No.

The Court: Perhaps we had better take a recess at this time. I think I will ask you to come back a little earlier today and see if we can't move along in this case. We will adjourn until a quarter to two. [183]

Wednesday, September 25, 1957

1:45 o'clock p.m.

Mr. Castro: At the recess I was handed a copy of the 1955 tax return of Mr. Jensen, your Honor, by counsel, and I would ask that it be marked for identification at this time.

(The copy of the income tax return referred to was thereupon marked Defendant's Exhibit I for identification.)

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): Mr. Jensen, following receipt of our letter of October 8, 1956, which is Defendant's Exhibit H, did you look for any of the invoices that were requested?

A. I never received the letter at all at no time.

Q. Would you look at this letter, Mr. Jensen, and tell me whether you recall that you received that letter? A. No, sir, I never did.

Mr. Hilger: I think to save time it can be stipulated that it was received and directed to my attention, and I discussed it with the witness on or about the day its date bears.

The Court: Counsel, in order that there will not be any misunderstanding about it, I see this letter is addressed to the counsel.

Mr. Castro: No, it is addressed to Mr. & Mrs.——

The Court: It was in care of Frederick Hilger, Attorney at Law; so obviously he got the letter and not the——

Mr. Hilger: And I stipulated twice that I did get [184] the letter and that I discussed its contents with Mr. Jensen after examination of the record was made by Mr. Stearns and Mr. Mitchell, representatives of the Boston Insurance Company.

Q. (By Mr. Castro): Now on October 12th during your examination under oath did we discuss the subject of whether you were to obtain copies of the invoices which were missing?

A. I don't remember whether we did or not. If I said I did in this it would be correct either way.

(Testimony of Hyrum Jensen.)

Mr. Castro: At this time, your Honor, I would ask to read into the record from the examination under oath page 154, commencing at line 19, counsel, to page 155, line 19:

“Q. (To Mr. Jensen) Now, with reference to the documents have you requested any of the people that sold you merchandise to give you copies of vouchers, invoices or bills showing the merchandise that you have received?

“A. Well, we already had those bills.

“Q. You have all the bills then for the merchandise that was received?

“A. Yes, did have. I don't know whether we got them now or not.

“Mr. Castro: Now on the records that have been produced, Mr. Hilger, those contained in this container, do they contain any invoices?

“Mr. Hilger: They contain certain invoices, [185] yes, the remainder of the invoices are down at the office available for your inspection. They are bulky and also quite dirty.

“Mr. Castro: Those are the invoices which Mr. Stearns saw earlier, isn't that right?

“Mr. Hilger: Yes. I think the record should also reveal that notice of intention to take this deposition was not received until October the 10th, two days ago. It has been impossible to get any copies made of any missing invoices; in the interim if there is any specific request made, why, I feel—be assured that we're quite willing to have such copies prepared, but we'll have to have a little more time.

(Testimony of Hyrum Jensen.)

“Mr. Castro: That’s satisfactory on that, and I can give Mr. Stearns the information and he can write the letter directing your attention to what invoices he wants.

“Mr. Hilger: That’s satisfactory.”

Mr. Hilger: I have no objection to that.

Q. (By Mr. Castro): After that examination under oath, Mr. Jensen, did you ask any of the people who sold to you for copies of invoices?

Mr. Hilger: I object. The offer here was in request for specific invoices, they would then be furnished. There is [186] nothing in the record to show any request was made for specific invoices after that date.

Mr. Castro: You have our letter of October 19, 1956?

Mr. Hilger: I have many letters.

The Court: Now we are getting into correspondence between the attorneys concerning these matters, but that has nothing to do with it. Let us get through with this witness. He didn’t know anything about that apparently.

Q. (By Mr. Castro): Did Harold Dee Jensen appear for the examination under oath?

A. Yes.

Q. Did Harold Dee Jensen appear for the examination under oath on October 12, 1956?

A. I don’t think he did at that time.

Q. Did he appear at the office on that day?

A. No, not that I know of.

Q. Did he appear on any other occasion prior to

(Testimony of Hyrum Jensen.)

the time you filed the lawsuit for examination under oath?

Mr. Hilger: I will object. This is totally immaterial. There is no showing that it was the duty of Harold Dee Jensen to appear any place at the request of the insurance carrier. He was not the insured under the policy.

The Court: I will sustain the objection.

Q. (By Mr. Castro): Did you see Harold Dee Jensen on the morning of the examination under oath? [187]

A. Under my examination——

Mr. Hilger: Objection.

The Court: Same ruling.

Mr. Castro: I would like to lay a foundation, your Honor. That is what I am trying to do.

The Court: What difference does it make whether he saw him or did not see him? What has that got to do with it?

Mr. Castro: There are cases that hold, your Honor, that you are entitled to examine the employee under oath on these losses.

The Court: What has that got to do with the examination of this witness? If you want to make a point of it all you have to do is to show you requested the examination but he did not appear. I do not see how that is material in the examination of this witness.

Mr. Castro: I want to show this witness sent him out of town that morning.

The Witness: That is a lie.

(Testimony of Hyrum Jensen.)

Mr. Hilger: Does that answer the question, counsel?

Mr. Castro: I move to strike that out as not responsive.

The Court: I don't know. You brought it on yourself, counsel. You made a statement as an officer of the Court that this witness did something that is not only unconscionable but perhaps unlawful, and he has a right to respond to that. I will [188] allow the answer to stand.

Mr. Castro: May I cross examine him?

The Court: I will hold that this type of examination is at this point immaterial.

Mr. Castro: Then may I ask that the answer be stricken from the record, since I am deprived of cross examination?

The Court: No. I will allow the answer to stand for the reason I have stated. I am not going to elaborate on it. I have already stated the reason for the Court's ruling.

Q. (By Mr. Castro): On the morning of the examination under oath did you furnish Dee Jensen your car to leave the City of Eureka?

Mr. Hilger: I will object to that as totally immaterial.

The Witness: I can answer. No.

The Court: I will sustain the objection.

Q. (By Mr. Castro): On the morning of the examination under oath, did you know that Dee Jensen was requested to appear for that examination under oath?

(Testimony of Hyrum Jensen.)

Mr. Hilger: I object to that as immaterial.

The Court: Sustained.

Q. (By Mr. Castro): On the morning of the examination under oath you sent Dee Jensen out of the City of Eureka, didn't you?

Mr. Hilger: I will object to that and cite it as [189] misconduct of counsel, in addition to being immaterial.

The Court: I will sustain the objection, and if counsel persists in this examination I will take further measures. You have already asked that question and he answered it in quite emphatic terms, and I do not think there is need to repeat it.

Mr. Castro: May I make an offer of proof in that regard, your Honor?

The Court: If you want to make an offer of proof we will excuse the Jury. I do not want you to have any prejudice as the result of it.

Mr. Castro: I would like to make an offer of proof on the subject.

The Court: All right. Take the Jury out for a brief recess.

(Thereupon, the Jury left the Courtroom, and in their absence the following occurred:)

Mr. Castro: Referring to page 153 of the examination under oath, I offer to prove the following, commencing at line 26:

"Mr. Hilger: I directed Mr. Dee Jensen's attention to the fact that he had been requested here.

"Mr. Castro: The record can show that he has not appeared here today, is that correct?

(Testimony of Hyrum Jensen.)

"The Witness: I haven't seen him here. [190]

"Mr. Castro: You say he went to Orick?

"A. I think he did. He was talking about it, Orick or Arcata, I don't know which, don't know how long he was going to go or anything about it.

"Q. Is he working at the present time?

"A. Once in awhile.

"Q. For whom? "A. For me.

"Q. Where? "A. In the yard.

"Q. Is he working for you today?

"A. Yes, sir.

"Q. What did you send him to do?

"A. Buy some lumber.

"Q. Where?

"A. Arcata, Brookings or Orick, anywhere he could buy some.

"Q. And did you furnish him transportation for it? "A. Yes, sir."

Page 152, commencing at line 18:

"Mr. Castro: Now where is your son Dee today?

"A. I don't know, up in Orick somewhere.

"Q. Did you see him today?

"A. Yes, this morning. [191]

"Q. Did you see him here in Eureka today?

"A. Yes.

"Q. Did you talk to him? "A. Yes.

"Q. Have you talked to him about appearing here at this examination today?

"A. I told him I was going to be here.

"Q. Did you request him to be here?

"A. No, sir.

(Testimony of Hyrum Jensen.)

“Q. Did you ask him whether he was going to be here? “A. No, sir.

“Q. Did he tell you that he had been requested to be here? “A. No, sir.

“Q. How did you receive your request to be here? “A. Mr. Hilger asked me.

“Q. Did he give you any letter?

“A. No, sir.

“Q. Did he tell you how he happened to make that request?

“A. Told me he wanted me to come up and take an oath and testify.

“Mr. Castro: Mr. Hilger, did you give him the letter which we sent in care of you for him? [192]

“Mr. Hilger: No, I didn't. I directed him—his attention to the fact that he was called up here to testify as per request contained in the letter.

“Mr. Castro: Did you receive the original letter?

“Mr. Hilger: Yes.

“The Witness: I imagine.

“Mr. Castro: And also addressed to Dee Jensen, did you call it to his attention?

“The Witness: No, I didn't.

“Mr. Castro: I am asking Mr. Hilger.”

And then it continues from the point I just started to read. The record and the evidence so far, apart from this subject matter, is that the witness has constantly referred to the fact that Dee Jensen had charge of the inventory. Dee Jensen had charge of the information that went into the inventory. He had charge of the information which went into the

(Testimony of Hyrum Jensen.)

financial statements which have been admitted in evidence on Plaintiff's behalf, and this witness states he has no knowledge, and he accepts the word of Dee Jensen concerning what is in there. Those matters are all relevant to the defense of this case, and that was one of the reasons why we had asked for the examination of Dee Jensen.

The Court: What is it that you want to prove? What [193] is it that you want to get?

Mr. Castro: I would like to take evidence such as I have read to this Court at this time, because it would constitute a defense of the failure to produce Dee Jensen at that examination under oath.

The Court: Specifically what is it you want to do, Mr. Castro? Do you want the questions and answers that you read from this record, is that the testimony that you want to present?

Mr. Castro: That is correct, to support the defense in the case that Dee Jensen was required to appear and did not appear at the examination under oath. As part of his employment he was sent out of town.

The Court: You have already elicited from the witness the fact that Dee Jensen was not present at that hearing on that day. You have already brought that out.

Mr. Castro: I wanted to show the further circumstance that his father sent him out of town on that particular occasion when he was requested to be there for the examination under oath.

Mr. Hilger: Number 1, your Honor, if I may

(Testimony of Hyrum Jensen.)

comment a bit, this statement under oath reveals that this witness did not at the time he was called for his examination know that Mr. Dee Jensen had likewise been requested. He so stated in his statement under oath at that time, that he had received a request [194] form to appear, and that he did not know Dee was to appear. I personally notified Mr. Dee Jensen, who was at that time represented by independent counsel, and we could do nothing to require the presence of Mr. Dee Jensen if he decided not to show up. But he was notified. Secondly, and this would seem to dispose of the whole point, the defense simply is not raised in the pleading and it is not responsive to any issue raised in the pleading, and it would be an immaterial defense at this time. It is an affirmative defense. He seeks to show a condition subsequent, something the insured had to do after the fire, and therefore it is a special defense. He has not raised it in his pleadings and I submit, your Honor, it is immaterial.

The Court: This suit is only brought by the witness Hyrum Jensen?

Mr. Castro: That is correct.

Mr. Hilger: That is correct.

The Court: I do not quite understand how there is any materiality to this at all. In fact, it has already been developed, and I will accept counsel's statement that he has just made, that the son was notified but did not appear.

Mr. Hilger: There is an issue raised as to whether or not this insured submitted to examina-

(Testimony of Hyrum Jensen.)

tion, but there is no evidence raised that he or his employees did not submit, and this insured has submitted to a 158-page examination, which is before the Court. Now, the fact that his son when notified did [195] not appear, when this man did nothing to prevent his appearance—he did not even know he was supposed to appear—certainly would not bring itself within the issue raised by the pleading that the insured failed to submit.

Mr. Castro: I think it is for the jury to determine whether or not this man knew his son had been requested to appear, your Honor.

The Court: It only becomes a Jury question if there is some evidence.

Mr. Castro: I wanted to point out to the Court the named insured under the policy is the Eureka Lumber Company, and neither Hyrum Jensen nor Dee Jensen is named as an insured.

The Court: The only one who is making any claim against the insurance company by virtue of a claim and suit is the witness Mr. Hyrum Jensen?

Mr. Hilger: That is correct.

The Court: There is nobody else who can recover against you, and you are not being sued by anybody else. If that does not establish his right of claim against you he is out of Court. It doesn't make any difference whether anybody else has any claim or not. I think that is the only issue in the case.

Mr. Hilger: The only issue, as I see it, that is

(Testimony of Hyrum Jensen.)

raised by the pleadings is whether or not this named insured submitted to an examination, and plaintiff concedes that he did. [196] There is no request for an employee of Mr. Jensen to appear. There is no request that any of his agents be asked to appear. A request was made of a specific individual, and at that time it was made on the theory that he was a partner.

Mr. Castro: There is nothing in the notice to indicate it was made on the theory of a partner or employee.

Mr. Hilger: There was much discussion about it, though, counsel.

The Court: I can see nothing in your offer of proof, counsel, that is material to any of the issues in this case. Also I think if the Court were to permit it to go in, because of the fact that jurors are sometimes prone to draw inferences and conclusions from attorneys' assertions, it might work an undue prejudice to the plaintiff in this case whose rights are before the Court, as well as the rights of the defendant. I can see no possible materiality to this except some sort of atmosphere, coloring matter, but it has no materiality to the issues of this case as far as I can see. I will hold that the subject matter as described by counsel in his offer of proof is immaterial.

Mr. Castro: I would like to call the Court's attention to one case on the subject matter, *Hart vs. Mechanics & Traders Insurance*, 46 Fed. Sup. 166, where it points out the purpose of the provision for

(Testimony of Hyrum Jensen.)

an examination under oath of an insurance policy is to protect the insurer against fraud by [197] permitting it to probe into the circumstances of the loss, including an examination of the insured or his agents. It constitutes a bar.

The Court: There is nothing to stop you from urging any legal defense that you have. I am not ruling on any of your defenses. The only question is whether it is material to the examination of this witness at this time. If you establish, as I assume you are able to, that the other man, Dee Jensen, did not appear and did not give his examination, then you can make that legal point at the time, whenever you deem it proper to do so, but I do not see that the subject matter you are urging in your offer of proof is material examination of this witness.

Mr. Hilger: Under the policy provisions only the sworn statements of the insured are required and not the insured and/or his agents.

The Court: Counsel, that is a legal question that may be presented at some time or other as a defense by your opponent and you have an answer to it. All I am going to rule on now—and I think it has been a waste of time—is with respect to the examination of this witness on a matter that apparently is not subject to any dispute, namely, that Dee Jensen did not appear and his examination was not had. What the consequences of that are is a legal question. For the reason I have stated, I will hold that the subject matter in [198] the

(Testimony of Hyrum Jensen.)

examination of this witness disclosed in your offer of proof is not material and it should be rejected. I think we had better bring the Jury back.

(Thereupon the Jury resumed their places in the Jury boxes, and the following occurred in the presence of the Jury:)

The Court: You may proceed, counsel.

Q. (By Mr. Castro): With reference to your method of doing business, Mr. Jensen, did you have a bank account at the Crocker-Anglo Bank during 1954, 1955 and in 1956? A. Yes.

Q. Was that where all the moneys that were received from the sale of merchandise were deposited? A. Most of it.

Q. Did you deposit everything there except for petty cash? A. Yes.

Q. And on petty cash did you leave a slip in your cash register when you took petty cash?

A. I did, yes.

Q. Did your Eureka Lumber Company have a complete set of books to show its business?

A. Yes, we did.

Q. Where any of those books destroyed in the fire? A. Yes.

Q. What of the books were destroyed in the fire? [199] A. I don't know.

Q. Where were the books kept?

A. Some of them was in the lower office and some was in the upper office.

Q. What books were kept in the lower office?

(Testimony of Hyrum Jensen.)

A. I don't know. I think a lot of the invoices and daily sales were kept in the lower office.

Q. Were the sales invoices, that is, the people you purchased from, were they kept in a metal filing cabinet?

A. Some of them were in a metal filing cabinet and some was in wood.

Q. Were they kept in the desk section of the downstairs office?

A. Some were in metal—yes, they were. We had two offices. One was my son's office and the other one was the bookkeeper's office.

Q. At the time of the fire in June of 1956, Dee Jensen had moved his office to the upstairs section, had he not?

A. He had a new office upstairs, yes.

Q. The bookkeeper at that time was Ellen Van Harpen?

A. We had two bookkeepers at that time.

Q. Was Ellen Van Harpen one of the bookkeepers at the time of the fire?

A. Yes, she was.

Q. And she worked downstairs? [200]

A. Yes.

Q. And she took care of the invoices, didn't she?

A. Yes.

Q. And she worked behind this desk which is shown in Exhibit G? A. Yes.

Q. Is that where the metal cabinet was kept, where the invoices were?

(Testimony of Hyrum Jensen.)

A. I believe there was a metal cabinet there, as well as the wood desks.

Q. Was the wood desk destroyed or damaged in the fire?

A. No, sir. It was damaged by water and smoke.

Q. Did you see the accounts receivable book after the fire? A. No, sir.

Q. Did you see the accounts payable book after the fire? A. No, sir, I did not.

Q. Did you see the general ledger book after the fire? A. No, sir.

Q. Did you see the cash and sales journal after the fire? A. No, sir, I did not.

Q. Were any of those books damaged or destroyed in the fire? A. That I don't know.

Mr. Hilger: I object to that. How can he know what happened to them if he has never seen them after the fire?

Q. (By Mr. Castro): Did you look for any of those books [201] after the fire?

A. I did not, no.

Q. Weren't those books kept on the shelves, underneath the counter shown in Exhibit G?

A. They could have been. They could have been under the shelves where we had a file for them. There were many books, hundreds of them.

Q. Was the accounts receivable book kept in a ledger form book?

A. I imagine they were. Did you mean to wholesale or retail?

(Testimony of Hyrum Jensen.)

Q. Both.

A. I imagine they were, yes.

Q. Were the accounts payable records kept in a ledger form?

A. We kept a complete set of books.

Q. When is the first time you made up your mind as to how much inventory you had at the time of the fire?

A. I never made up my mind at no time. I hired two men to go down and take an inventory after the fire.

Q. You do not know what the inventory was at the time of the fire, do you? You do not know what the inventory was in the building at the time of the fire, do you?

A. Yes, I do. I knew what was in it, yes.

Q. I will ask you to look at the examination under oath, page 61, commencing at line 26, to page 62, line 4.

A. Down to five, did you say? [202]

Q. Yes, to that question. A. Okay.

Q. On October 12th in the examination under oath did I ask you these questions and did you give these answers:

“Q. How much merchandise did the Eureka Lumber Company have at the time of the fire?

“A. I couldn’t say. I don’t know what their records show. The bank has a statement of the amount or finances at that time or sometime about that time. Now I don’t know how much there was.”

Did you give those answers to those questions?

(Testimony of Hyrum Jensen.)

A. Those answers are correct.

Q. For several months prior to this fire, Mr. Jensen, had the business been falling off?

A. Yes, it had.

Q. Had it started to fall off sometime in the fall of 1955?

A. I think it had. It was a general slump with everyone.

Q. And was it continuing to get worse up to the time of the fire?

A. Well, it probably was a little worse.

Q. You owed considerable money at the time of the fire, didn't you? A. Yes, we did.

Q. How much was it?

A. I don't know how much it was. [203]

Q. Could it be as much as \$20 to \$30,000?

Mr. Hilger: I object to that as asked and answered. He said he didn't know how much it was.

The Court: I will sustain the objection; also on the ground that it is incompetent and immaterial at this point in the case. I think I covered that in a ruling I made earlier.

Mr. Castro: I understand that. We will reopen that in the defense of the case.

Q. Have you been an employee of Harold Dee Jensen? A. Have I been?

Q. Yes.

A. I worked with Harold Dee Jensen but I have never been an employee of his.

Q. Weren't you an employee of his with relation to the sawmill on the Hanson Road?

(Testimony of Hyrum Jensen.)

A. I worked with him a lot.

Q. Didn't you work there as an employee of Harold Dee Jensen?

A. I worked with him, yes.

Mr. Hilger: I will object to this until we establish what period of time we are talking about.

The Court: Is he talking about this property?

Mr. Hilger: No.

Mr. Castro: Property which was transferred for this property, your Honor.

Mr. Hilger: In 1955 a sawmill was transferred and [204] exchanged for the Eureka Lumber Company as part of the purchase consideration when Mr. Jensen acquired the Eureka Lumber Company. That would have to go back prior to 1953.

The Court: This question goes to the right of ownership of the plaintiff in this claim.

Mr. Castro: Yes, to the acquisition of this property which is involved in this claim.

Mr. Hilger: I consider it is too remote to have any bearing.

The Court: There is no question pending now.

Q. (By Mr. Castro): Was Harold Dee Jensen your employer at that time? A. No.

Q. Did Harold Dee Jensen run into financial difficulties in that operation on the Hanson Road?

A. I don't know.

Mr. Hilger: I object to that as going too far afield, your Honor, incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): What is a cut-off plant?

A. What is a cut-off plant?

Q. Yes. A. I don't know.

Q. Did you ever buy a cut-off plant with Harold Dee Jensen? A. No. [205]

Q. Did you ever trade any property with Harold Dee Jensen or anybody else for a cut-off plant?

A. Not that I remember.

Mr. Hilger: I object to this until we establish what he is talking about. He could go back to 1928 so far as I know now.

Q. (By Mr. Castro): Did you have a cut-off plant at this property that was involved in this fire?

A. I don't know what you mean by a cut-off plant.

Q. You have never heard of the term before?

A. No, I have not, not in the lumber business.

Q. I will show a photostatic copy certified by the Recorder's Office at Eureka, California, and ask you if your signature is on that document?

A. Well, if you are referring to a cut-off plant, that means the yard, Eureka Lumber Company.

Q. First, is that your signature on the original of that document? A. Yes, it is.

Q. Is that your wife's signature on the original of that document? A. I think it is.

Q. Is that the signature of Harold Dee Jensen?

A. I think so.

(Testimony of Hyrum Jensen.)

Q. Is that the signature of the wife of Harold Dee Jensen? [206] A. I don't know.

Q. Who is Eula Jensen?

A. That used to be his wife.

Q. And her signature appears on that document, too, doesn't it?

A. There is a Eula Jensen on there.

Q. Does that document refer to a cut-off plant?

A. Yes, it does.

Q. What is a cut-off plant?

A. I don't know.

Q. What was being acquired under that document that is described as a cut-off plant?

A. I think it is the Eurkea Lumber Company, it probably means.

Q. In other words, this document where it states "to trade a cut-off plant and equipment (subject to sales contract) located at 210 Broadway, Eureka, California"—is that the Eureka Lumber Company?

A. Yes.

Q. The westerly boundary of this property is Broadway, is it not? A. Yes.

Q. Was there a cut-off plant on that property?

A. No, sir.

Q. What was this document referring to [207] when it described it as a cut-off plant?

A. I don't know. I think it would be referring to a little yard that we had on the Bear Road site across Broadway.

Mr. Castro: I offer the document into evidence as Defendant's next in order.

(Testimony of Hyrum Jensen.)

Mr. Hilger: I object to this as incompetent, irrelevant and immaterial to any issue in this case. It does not show who was acquiring, who was transferring. It is nothing in the world but a mutual release.

Mr. Castro: I offer the document.

Mr. Hilger: I have no objection to the authenticity of the document, Your Honor. It is just that it is immaterial and incompetent to prove anything that is in issue in this case.

The Court: It seems to have been drawn up by attorneys, but I have some difficulty in understanding it.

Mr. Hilger: It was not our office, Your Honor.

The Court: Apparently it was a 1953 transaction. I will sustain the objection on the ground it is too remote to this controversy. I think we have enough to do to try the problem of the claim here in 1956.

Mr. Castro: May we have it marked for identification?

The Court: Certainly.

(The document referred to was thereupon marked Defendant's Exhibit J for identification.)

Q. (By Mr. Castro): Immediately after [208] the execution of that document didn't you and Harold Dee Jensen take possession of the Eureka Lumber Company?

A. I did but Harold Dee Jensen never did.

Q. You were only the manager of that company, weren't you?

(Testimony of Hyrum Jensen.)

A. I owned the company. I owned the sawmill we traded for it.

Q. Didn't you hold yourself out as the general manager of that company?

A. No, sir, I was the owner.

Q. You never held yourself out as general manager? A. I was general manager and owner.

Q. I will show you Exhibit 18. Is that the letter-head of the Eureka Lumber Company?

A. That is right.

Q. You are shown as general manager of that company?

A. Yes, sir, and that includes the owner.

Q. Harold Dee Jensen is shown as the sales manager of the company? A. That is right.

Q. Harold Jensen ran the Eureka Lumber Company, didn't he? A. No, sir.

Q. Did Harold Jensen set up the books of account of the company?

A. Yes, he did, under my jurisdiction.

Q. Did Harold Jensen buy the lumber of the company? [209]

A. A lot of times he did, yes.

Q. Didn't he buy 90% of the lumber?

A. No—well, he bought a lot of the lumber. I don't know what percentage.

Q. Didn't you and Harold Jensen each have a drawing account at the Eureka Lumber Company?

A. No, sir.

Q. Didn't Harold Jensen take care of all the accounts payable?

(Testimony of Hyrum Jensen.)

A. He would pay them when they would become due, yes, with my signature on the check and nobody else's.

Q. Did you let him determine what was payable?

A. That is true.

Q. He handled the purchase of the real estate there, didn't he?

A. Yes, he did. He was my agent.

Q. In fact, you owed him money, didn't you?

A. No, sir.

Q. You did not owe Harold Dee Jensen money?

A. No, sir. Harold Dee Jensen owed me money.

Q. I will ask you to look at the examination under oath, page 72, starting at the top of the page, referring to the fresh water property, down to line 16. Will you read those questions and answers to yourself.

A. Yes, I have read them all. [210]

Q. The fresh water property is one of the pieces of property listed in that profit and loss statement, is it not?

A. That was a mistake.

Q. That was Dee's property, wasn't it?

A. Yes, it was.

Q. And that was purchased sometime in April, 1956?

A. I don't know just when it was purchased.

Q. Was it purchased during the year 1956 prior to the fire?

A. I don't know the date of it.

Q. Did I ask you these questions and did you give these answers:

Q. Didn't you own that property at the time of the fire?

"A. No, sir.

(Testimony of Hyrum Jensen.)

“Q. When did Dee acquire it?

“A. Got it in the first place.

“Q. Did you make any payments on that property?
“A. Did I?

“Q. In Freshwater, yes.

“A. I may have loaned him some money or something I don't know.

“Q. Is that your best recollection that you loaned him money for the property at Freshwater?

“A. I didn't loan him any money. I may have paid him some money we owed him down [211] there and he paid it.

“Q. What's your best recollection as to whether you turned any money over to Dee on account of that property in Freshwater?

“A. I never did turn any over, on account of the property. If he got any money from me, it was what we owed him.”

Did you give those answers to those questions?

A. Yes.

Q. Is it true you owed Dee Jensen money at the time of the purchase of the Freshwater property?
A. Dee Jensen owed me money.

Q. Dee Jensen cleared up his financial difficulties in 1955 by going into bankruptcy, did he not?

A. I don't know. I heard he did go into bankruptcy.

Q. Did he live at your home during 1955?

A. Yes, he did.

Q. And that was your home in Eureka? Did he

(Testimony of Hyrum Jensen.)

live at your home in 1956 up to the time of this fire? A. Yes, sir.

Q. Following his adjudication in bankruptcy didn't he open up a bank account?

A. He could have done.

Q. Didn't you sign checks transferring money from your account in the Crocker-Anglo Bank to his account? [212]

A. Yes, sir, many a time I did. He would go out and buy a large quantity of lumber and he would give them his check and I would reimburse them with my check.

Q. And he maintained that account right up to the time of the fire, using moneys which were coming from the Eureka Lumber Company, didn't he?

A. He never did get any money from the Eureka Lumber Company unless he had bought lumber and given his own check for it, which I would sometimes go up and make a deposit for him in order to keep his check from bouncing, in other words.

Q. You were having trouble with your checks bouncing in 1956 before this fire, were you not?

A. No, sir.

Mr. Hilger: I object to that.

The Court: I will sustain the objection. Counsel, this is not a proper subject of inquiry in this case at this time. A man could be bankrupt and still have a perfectly legitimate claim for fire loss against an insurance company. The only question involved is, What is the validity of his claim? Not whether he

(Testimony of Hyrum Jensen.)

is a poor man or a rich man. I will hold this whole line of inquiry, which I have ruled on before, is immaterial.

Q. (By Mr. Castro): Was Harold Dee Jensen in 1956 running all his transactions through the Eureka Lumber bank account?

A. Did he, did you say? [213]

Q. Yes. A. I don't know.

Q. I ask you to look at your examination under oath again.

A. I knew he had a bank account down there because I would deposit money for him, a lot of it.

Q. I ask you to look at page 43 of your examination under oath.

A. I still answer I don't know.

Q. In the examination on October 12th did I ask you these questions and did you give these answers:

Mr. Hilger: Where are we reading from now?

Mr. Castro: Page 43, line 23, to page 44, line 6:

"Q. Did he (referring to Dee) have any other income from the business? "A. No.

"Q. Did he work any place else?

"A. No, not that I know of.

"Q. That was his sole source?

"A. He may have worked some for himself on some deals. I don't know about that, though.

"Q. What's your best recollection or knowledge on the subject?

"A. I think that probably everything was run through the Eureka Lumber Company."

(Testimony of Hyrum Jensen.)

Did you give those answers to those questions?

A. That is true. There was times after the fire that I did let my son operate under the Eureka Lumber Company name. I was burned out and I had no place of business.

Q. He was operating under the Eureka Lumber Company name prior to the fire, too, wasn't he?

A. No, he was not. Never. He would buy lumber for the Eureka Lumber Company.

Q. At the time of the fire there was certain trucking equipment which the Eureka Lumber Company was buying, wasn't there?

A. I didn't hear what you said.

Q. At the time of the fire there was certain trucking equipment which the Eureka Lumber Company was buying? A. Yes.

Q. Consisting of four units?

A. We had four or five trucks, yes.

Q. And you had those financed through the General Motors Finance Company or the Yellow Motors Acceptance Corporation?

A. Yes, I think we did.

Q. After the fire you transferred all those four trucks to Harold Dee Jensen, didn't you?

Mr. Hilger: I object. It is immaterial what he did after the fire.

Mr. Castro: It goes to show the course of conduct between them, your Honor, as to whether or not Dee Jensen had [215] any interest in the proceeds of this insurance.

Mr. Hilger: What may have led to a transfer,

(Testimony of Hyrum Jensen.)

if such occurred—and I certainly do not know whether it did or did not—but whatever took place after this fire certainly would not tend to or be admissible to establish retroactively any pre-existing relationship or any relationship at the time of the fire.

The Court: It is too hard for me to rule on that in the present state of the record. I will allow the question, and if it develops that it is immaterial, I will instruct the Jury to disregard it.

Q. (By Mr. Castro): Following the fire did you transfer those four units to Harold Dee Jensen?

A. We tried to. He was going to take over the trucking deal because I was all through with the lumber business, and they didn't transfer them.

Q. Did he pay you anything for those four units? A. No, no, he was going to.

Q. (By the Court): Your answer is that you did not transfer these trucks after the fire to your son?

A. That is right. We tried to but they wouldn't transfer them.

Q. So you didn't transfer them?

A. No.

Mr. Hilger: I move that the entire matter be stricken. [216]

Mr. Castro: We will have evidence to offer on that, your Honor, the official records concerning it.

The Court: Let the answer stand for the time being.

Q. (By Mr. Castro): Isn't it true, Mr. Jensen,

(Testimony of Hyrum Jensen.)

immediately after the fire occurred you kept yourself out of trying to present any claim for this insurance?

Mr. Hilger: What was the question? I can't follow this.

The Court: I think you had better *refrain* that.

Q. (By Mr. Castro): Isn't it a fact that you kept your nose out of how Harold Dee Jensen was running the Eureka Company at the time of the fire?

Mr. Hilger: I will object to that, the use of the words "keeping his nose out."

Mr. Castro: I am using language that he used before, your Honor. I apologize for that expression, but that is language which he has used before.

The Court: You have gone over this pretty much with this witness as to just what the son did in the business and now you want to get something about a nose in it.

Mr. Castro: That is only because the witness used the expression himself.

The Court: I will sustain the objection.

Q. (By Mr. Castro): Did Harold Dee Jensen [217] take care of all the records and inventory after the fire?

Mr. Hilger: I object to that as asked and answered many times.

The Court: I think this question was directed to after the fire.

Mr. Castro: That is right, immediately after the fire, your Honor.

(Testimony of Hyrum Jensen.)

A. Yes, he did.

Q. (By Mr. Castro): Do you know what he found with the records?

A. That was his records.

Q. Do you know what he found with the records? A. I didn't get the answer.

Q. Do you know what he found with the records? A. What he found with them?

Q. What records he found.

A. No, I do not.

Q. You say that was only his records that he took care of?

A. No, no. He took care of all the records. You asked me what he found. I don't know.

Q. Do you recall the accountant that was there for the Boston Insurance Company at your office with Mr.—his name was Russell Stearns, with you and Dee Jensen?

A. I didn't get the question.

Q. Do you recall an occasion after the fire when [218] Russell Stearns, the accountant for the Boston Insurance Company, was present at your office?

A. It seems like I remember somebody but I don't remember the name.

Q. Was Harold Dee Jensen there at that time?

A. I can't remember. I don't even remember if I was there.

Q. You have no recollection of a meeting with an accountant from the Boston Insurance Company?

A. No, I really don't. There were so many in-

(Testimony of Hyrum Jensen.)

surance people there that I don't know them by names.

Q. Mr. Jensen, when the Eureka Lumber Company commenced to operate at this location, did you change the locks on the doors of the building?

A. No, we did not. Not for a long time after.

Q. Prior to the time of the fire on June 25th did you change the locks on any of the doors to the building?

A. I believe we did on a little office, the one that we had down in the lower yard. It was broken. That is here (indicating). We didn't change it because it was supposed to be changed. It was broken. Somebody tried to break into it.

Q. That is an office building that is somewhere west——

A. In the open yard. It wasn't an office. It was a storehouse where we kept saw blades, hammers.

Q. This door to which I am pointing, is that the front door of the building? [219]

A. Yes, it is.

Q. Is that the door for going into the downstairs office which has been shown in the picture?

A. Yes.

Q. Is that the door that enters to go upstairs to the second floor? A. Yes.

Q. Before the fire, and after possession was taken of the property, did you change the lock on that door? A. I believe we did.

Q. Did you put a new lock on the door?

A. If I remember right, we did.

(Testimony of Hyrum Jensen.)

Q. Did you have keys to that new lock?

A. Yes, we did.

Q. Were the persons who had those keys yourself, Ellen Van Harpen, and Harold Dee Jensen at the time of the fire? A. Yes.

Q. Was that the only outside lock that you had on that building?

A. We had many other locks that was locked on the inside, but that was the only one that had a lock on that we opened with a key in the building.

Q. That was the one door which was used to enter from the outside?

A. That is right. [220]

Mr. Castro: May we mark it with a Roman numeral I, your Honor.

Now, there are other doors in the building, aren't there? A. Naturally, yes.

Q. There was a door marked "Loading Door" on the east wall of the building? A. Yes, sir.

Q. Does that door open on the outside or is it locked from the inside?

A. It is locked from the inside.

Q. May we mark it II, and what was the nature of the inside lock?

A. It seems like we had a hasp and staple and a bolt that ran through it. I don't recall exactly what it was, but we had a lock on it.

Q. Was there a door at the northeast room to which I am pointing? A. Yes, there was.

Mr. Castro: May we mark it number III.

(Testimony of Hyrum Jensen.)

Q. Was that door locked from the inside or the outside? A. Inside.

Q. What type of inside lock did you have for it?

A. We had a big hook about that long (indicating), and we put that long piece with a hook on it, bent over, and it hooked into a big hasp. [221]

Q. With reference to the room next to that, was there a door to which I am pointing?

Mr. Castro: We will mark that Roman numeral number IV.

Q. Was that a door which was locked from the inside or the outside? A. This, inside.

Q. What type of lock did it have on the inside of that door?

A. I think we had a long chain or a heavy wire, I don't remember which it was, fastened up or bolted up on one of the timbers.

Q. The office or the warehouse section of this shed, the building only had this other door to which I am now pointing?

A. You mean from the outside?

Q. Yes.

A. That went into the outside shed, yes.

Mr. Castro: May we mark it with Roman numeral number V.

Q. Was that door locked from the inside or the outside?

A. It was locked from the inside.

Q. What type of lock did it have?

A. I think it had a hook and a staple also, or a bolt running through a staple.

(Testimony of Hyrum Jensen.)

Q. You referred to a Kaiser automobile. That was kept in this particular room? [222]

A. Yes.

Q. Had that Kaiser automobile been used on the day of the fire? A. No, not that I know of.

Q. Was that Kaiser parked in this general area?

A. Yes, it was. That is where we stored it.

Q. How long since that Kaiser had been taken out of that room before the fire?

A. I can't remember. It had been quite awhile.

Q. Was it approximately two weeks before the fire the last time you used it?

A. It seems like we took it out and took the welder out of it, which probably could have been two months ago before that, and we put the welder out in front in the shed part.

Q. Was the door number V used to go from the office out into the open shed or did you keep that locked at all times?

A. Well, we used it if we wanted to. At night we would lock it. If it was necessary to get merchandise out of there, we would unlock it.

Q. Isn't it a fact that it was the practice to come out in the walk area?

A. Wasn't it what?

Q. Wasn't it your practice to come out onto the walk area instead of using door number V?

A. I don't know. We come out both ways, but [223] generally I think there was quite a pile of lumber and stuff piled against that one door. I

(Testimony of Hyrum Jensen.)

don't know if we used it very often, but if we wanted to use it, it could be used.

Q. At the time of this fire you indicated there was redwood molding up to the point of that door.

A. That's right.

Q. Wasn't that the reason you walked around the outside of the door?

A. Well, we used both doors.

Q. I will ask you to look at the examination under oath at page 141 commencing at line 14 to line 25. Will you read those questions and answers to yourself?

The Court: I do not know why lawyers practicing in the State Court follow this procedure of asking a witness to read something to himself first. You can just as well read it aloud to him and he can follow it.

Q. (By Mr. Castro): In your examination under oath on October 12th did I ask you these questions concerning that door number V and did you give these answers? A. Yes, you did.

Q. And did you tell me at that time, "A. The door, it's sitting right here. We could open it if we wanted to." A. That is right.

Q. "We never used it. We would go outside and come around the big doors here, was solid doors, and we just shut them." [224]

A. That's right.

Q. Does that refresh your memory now as to whether you used that doorway number V?

The Court: Counsel, he has not made any men-

(Testimony of Hyrum Jensen.)

tion with respect to this matter and I do not see the materiality of it. What difference does it make what doors they went through?

Mr. Hilger: I object on the ground it is incompetent, irrelevant and immaterial, not contradictory, and therefore not proper cross examination.

The Court: I will sustain the objection.

Q. (By Mr. Castro): When you came back after the fire alarm sounded did you try to go into that front door which is number I?

A. Yes.

Q. Was it open or closed?

A. It was open, as far as I remember. I was very excited. I tried to go in and pick up some records, and one of the policemen stopped me.

Q. Isn't it a fact that it was closed and locked when you got there?

A. I am not saying for sure. I know I was there in time to see the firemen bust this big plate glass out in front, and I made for the door and some of the police officers grabbed me.

Q. You never tried that door when you returned then? A. I don't remember, sir. [225]

Q. With reference to the building before the fire, what time did you leave the building?

A. I imagine about five minutes after 12.

Q. What time were you returning to the building?

A. If I remember right, it was near half-past 12. I didn't look at my watch and make it exact, but it was long enough for me to order a sandwich

(Testimony of Hyrum Jensen.)

and drive about seven or eight blocks and return.

Q. At the time you went for your sandwich, did you take Dee's son with you and another boy?

A. That is right.

Q. Did you leave anybody at the office building when you left there?

A. I wasn't in there. I was talking to a customer at the time, at noon, about a few minutes before noon, and my son was—had the two boys, and he was going to take them to lunch, and I had this order, and I asked him if he would go in and write it up. It was a large order, and there was a lot of figuring to do and he could do it quicker than I could. He said, "Okay, if you'll take the boys."

Q. And then he went into the office section downstairs?

A. I imagine he did. I didn't see where he went.

Q. Do you know of anybody else who was in the building when you left for your lunch?

A. No, I do not. We always closed it up during the noon hour. [226]

Q. What time did this fire start?

A. I don't know. When I got back it was burning.

Q. You can't tell us the time the fire started?

A. No, sir, because I wasn't there.

Q. Didn't the fire start about 12 o'clock?

The Court: He has already said he doesn't know.

A. I was there at 12 and there was no fire.

(Testimony of Hyrum Jensen.)

Q. (By Mr. Castro): You have no knowledge as to the time the fire started?

Mr. Hilger: Asked and answered. Objection.

The Court: Sustained.

Q. (By Mr. Castro): I show you the original proof of loss. Didn't you put in it the fire started at 12 noon?

The Court: I will sustain the objection. The document speaks for itself.

Mr. Castro: I will offer the document into evidence.

The Court: Haven't you got it in already?

Mr. Hilger: The proof of loss I think is in or a photostatic copy is in already.

Mr. Castro: That does not correspond to this one, which is the original, your Honor.

The Court: Number 5 is supposed to be the proof of loss.

Mr. Castro: That does not correspond. The time [227] is left blank on that, whatever that photostat is.

Mr. Hilger: These are photostats.

Mr. Castro: I do not know, your Honor. That is why I am offering the original.

Mr. Hilger: We will stipulate the original says about 12 o'clock noon.

The Court: The photostat is not a correct photostat.

Mr. Hilger: Apparently it is not.

Mr. Castro: That is why I am offering the original.

(Testimony of Hyrum Jensen.)

Mr. Hilger: I am going to withdraw my stipulation. This is a photostat of that as it was sent in, and it did not have that notation on it. They can explain how that appears.

Mr. Castro: I am not going to explain anything.

Mr. Hilger: It is typed in. Anyone can type it in. I will withdraw my stipulation.

The Court: You have something queer about this. Obviously this is a photostatic copy. Where did you get this from?

Mr. Hilger: I think I got it from the copy of the complaint that was filed. It was one that was used for identification in a deposition that is to be read for the purpose of value as to the items contained therein.

The Court: This is not a photostat that you had? Is this a photostat that was furnished to you?

Mr. Hilger: It was made probably by our office, [228] your Honor. I think I took it off a retained copy of a complaint.

The Court: Apparently it is not a photostat of the one Mr. Castro is producing, because this one has the signature of Mr. Jensen on it and the signature of the Notary Public, and this one has it typed in. They are apparently two different copies.

Mr. Hilger: The photostat is a conformed copy with the signature of the notary typed in.

The Court: Have you seen this original?

Mr. Hilger: It would have emanated out of our office, so I guess I would have had to see it.

The Court: Do you want the original?

(Testimony of Hyrum Jensen.)

Mr. Castro: Yes, I do.

The Court: Put them both in. Make the one that has already been marked 5A and make the original, so we will have them together, 5B, Mr. Clerk.

Mr. Hilger: We do not mind them going in as a Plaintiff's exhibit.

Mr. Castro: We will offer the original as our exhibit, your Honor.

The Court: You would rather have the original marked as your exhibit?

Mr. Castro: Yes, your Honor, since there is a question about it.

(The original proof of loss was thereupon [229] received in evidence and marked Defendant's Exhibit K.)

Q. (By Mr. Castro): Mr. Jensen, where did you get the information that the fire occurred at about 12 noon?

A. I don't know where I got it. I probably answered it was around noon when the fire started.

Mr. Castro: Those are all the questions I have at this time, your Honor, reserving the matters which you suggested.

The Court: Very well. We will take the afternoon recess at this time.

(Recess.)

Redirect Examination

Q. (By Mr. Hilger): Mr. Jensen, in relation to the redwood moldings, what were your sources of supply for the material out of which you manufactured that product before the fire?

(Testimony of Hyrum Jensen.)

A. Well, we had bought about 70,000 board feet of Anzac.

Q. From whom had you purchased that?

A. Eureka Lumber Company—pardon me.

Q. The Eureka——

A. The Eureka Redwood Company.

Q. Eureka Redwood Lumber Company. That is the one that is now owned by Simpson?

A. Yes.

Q. That is one of the sources you had previously mentioned. Did you have any sources of supply for your raw material? [230]

A. Yes, we had.

Q. What were those sources?

A. We had much redwood in there.

Q. Where had you obtained it?

A. We had obtained it from Van der Fals, Eureka Redwood, Holmes Eureka, a number of places. I don't recall all of them.

Q. Had you bought any from Hammond Lumber Company? A. Yes, we did.

Q. Have you purchased any from Arcata Lumber Company?

A. We bought from Arcata Redwood.

Q. This type of product that you bought would not be the type of merchandise your supplier would sell in its state at the time of your purchase in its business; it was a scrap product, is that a fair statement?

A. Yes, we had to work it over.

Q. It was your function to remanufacture it into

(Testimony of Hyrum Jensen.)

other products of standard quality? A. Yes.

Q. At the time, however, that you bought it, it would have been considered a scrap product of the company from which you purchased it?

A. It wouldn't be considered as scrap, but it would be considered as a lower grade than they put on their product.

Q. A lower grade than they put—

A. A lower grade than they put on the market. [231] They sold nothing but number 1 stuff as a rule.

Q. After you manufactured it or applied your function to it, was it then a standard quality product? A. Yes, it was.

Q. You have referred to a purchase of Anzac, 70,000 board feet. What is Anzac?

A. That is 1x6, 8, or whatever it may be, sawed in two, and after it is sawed in two, it is still measured at that time as a full inch, and by sawing it in two, you double your footage. Instead of one foot you make two feet out of it.

Q. That is for the purpose of computing the scale? A. That is the purpose.

Q. First of all, Mr. Jensen, is it redwood, fir, or what is it? A. It was redwood.

Q. Is it kiln-dried product? A. Yes.

Q. Is it the type of thing that they put on the side of a house and they call it Anzac siding?

A. That is right.

Q. That is made ordinarily out of the top-quality redwood?

(Testimony of Hyrum Jensen.)

A. That is the very top quality of redwood. It must be a vertical grain and kiln-dried.

Q. By vertical grain what do you mean?

A. Well, vertical grain is the grain that stands [232] straight up in a piece of wood. Flat grain is one that is cut so that the grain runs flat.

Q. The vertical grain, only the edges of the grain would show on the face of the board?

A. That is right. If it is vertical grain, it only shows——

Q. I direct your attention to that piece of plywood behind you there. Is that an illustration of vertical grain or not?

A. That is not. That is what we call flat grain.

Q. It has the waves and figures through it?

A. Yes. This could be vertical grain more or less. It is a rough piece, but it is second growth of lumber.

Q. In order to obtain vertical grain lumber does it have to be specially cut in order to produce that?

A. Yes, it has to be put on your carriage and sawed so that your saw runs through the grain straight up and down instead of laying down. If it was laying down flat, it was a cheaper grade.

Q. The vertical grain lumber is the more expensive type? A. Yes, it is.

Q. Do you recall a specific purchase of that material from Eureka prior to the fire?

A. Well, we bought, ever since we have been in the business, practically all the factory outlet that they had at the Eureka Redwood, and we also

(Testimony of Hyrum Jensen.)

bought a considerable amount of green that we were stacking in our yard, and at our leisure time [233] we would run it through our edger and make 1x1's or whatever our orders called for to make, small moldings.

Q. I have reference now to the Anzac. Do you recall whether you purchased that from the Eureka Redwood Company?

A. Yes, we bought that from a very good friend of ours that was rather new in the business over there, and he was a very good friend of my son Dee's, and he made us a special price on it. He was going to give it to us but finally he said, "Oh, better give me \$10 a thousand." So we paid him \$10 a thousand. We paid it to him in cash. It wasn't run through the books or nothing.

Q. You have no knowledge——

A. Well, I take that back. I will say I have no knowledge.

Q. How much was involved in that purchase, Mr. Jensen?

A. It was about 70,000 board feet.

Q. And that was this Anzac type of material?

A. That was before it was split.

Q. Did you then remanufacture that into redwood molding products?

A. Yes, we did. We would cut off the poor sides, resaw some of it, and cut out a piece that was sawed crooked. The planer would drop down too far in one place on a long piece, and we would trim out the bad parts and use it in a shorter length.

(Testimony of Hyrum Jensen.)

Q. Reference has been made to "per thousand feet," and so [234] forth, and reference is made to the 66,000 board feet or board measure of redwood moldings involved in this fire. What is a board foot?

A. That is 1x1 by a foot square, twelve feet square or twelve inches square.

Q. In other words, a board foot is twelve inches by twelve inches by one inch thick?

A. That is right.

Q. And there would be on that basis twelve board feet and one cubic foot?

A. That is right.

Q. Does that measure or scale apply to the rough material out of which the finished products are made?

A. Yes, it does.

Q. If you should take a one-inch big board and dress it down or manufacture it down to a product that was a half inch thick, how would its thickness be computed for the purpose of determining board measure of the finished product?

A. It would tally the same as a full inch.

Q. In other words, a half-inch piece of material would be counted as finished material as full inch?

A. That is right.

Q. So that after the product was finished on the molding or other items, there would be more than twelve board feet per cubic foot? [235]

A. There would be just double?

Q. Around 24—— A. Instead of 12.

Q. Twenty-four board feet per cubic foot?

A. That is right.

(Testimony of Hyrum Jensen.)

Q. Mr. Jensen, you had in the course of the operation of your business various vehicles and machinery that you operated? A. We did.

Q. And those required fuel, I presume?

A. Yes, sir.

Q. Diesel fuel and gasoline?

A. That is right.

Q. Was it your practice to store that fuel supply on your premises at Third & Commercial?

A. Yes, it was. We had a bucket of fuel for washing tools, and so on, that set in by the work bench that we had there, probably half full of diesel, and we had other things that had grease or oil in it.

Q. Reference has been made to a drum of gasoline that was stored in there. Did you observe that drum of gasoline after the fire?

A. Yes, I did.

Q. Was the gasoline still in it?

A. Yes, it was.

Q. It had not been consumed by nor involved in the fire? [236]

A. No, it didn't. There was still gasoline in it.

Q. Reference has been made to 12 doors that were taken by a representative of Rice Supply Company after the fire. Was that person Paul Henning who took those doors? A. Yes, it was.

Q. Let me lead you along here so we can get through quicker. How long after the fire were those taken by Mr. Henning, do you recall?

(Testimony of Hyrum Jensen.)

A. I think it was two or three days after the fire.

Q. Was any charge made for those doors?

A. No, there was not.

Q. What was the reason for that?

A. Well, there was some doors and I had asked one of the firemen, Mr. McBeth, if it would be okay if I let him have them. And he said, "Go ahead."

Q. Were any of these doors that were taken by Mr. Henning included in the inventory attached to your proof of loss?

A. No, they were not.

Q. They were removed from the premises?

A. Yes.

Q. And you make no claim for those doors of any sort or character?

A. No.

Q. Reference has been made to certain property in Utah that was in your wife's name. Was it your practice and habit [237] of your wife to execute along with you all notes for money borrowed from the bank from time to time?

A. Yes, it was in California.

Q. She was a co-signer on all of these notes?

A. Yes, she was.

Mr. Hilger: That is all the questions I have at this time. I would like the Court to take judicial notice that an attachment is a procedure that issues prior to any judgment or determination of the controversy out of which the writ issues, inasmuch as reference has been made to attachments. Would the Court take judicial notice that an attachment is a remedy or a proceeding that issues prior to any

(Testimony of Hyrum Jensen.)

determination of the rights and merits of the controversy?

The Court: Of course, I know that. I have been at this game for almost or over 40 years. But what is it you want me to do about it?

Mr. Hilger: Take judicial notice of it so it might be considered in evidence for further comment at a later time in connection with the summation of this matter.

The Court: Are you referring to a question some other counsel asked about an attachment on a bank account?

Mr. Hilger: It has been established an attachment was levied against the account of the Eureka Lumber Company. I wish the record to show that an attachment is a remedy taken up before there is any decision on the merits of the controversy.

The Court: Do you want me to tell the Jury now? [238]

Mr. Hilger: I would appreciate if such notice were given.

The Court: I have judicial notice of it, but the Jury hasn't got jury notice of it, I suppose. What counsel is referring to, Ladies and Gentlemen, is that when somebody sues somebody else and claims they owe them money, they have an attachment issued against them and tie up their money. It is a preliminary proceeding and does not mean the man owes the money sued for or that he is going to get judgment. That question is decided at a later time in a court proceeding as to whether judgment will

(Testimony of Hyrum Jensen.)

be obtained. But this is a preliminary way of tying up somebody's money who you think owes you money. Is there any recross examination?

Mr. Castro: Just a couple of questions, your Honor.

Recross Examination

Q. (By Mr. Castro): Mr. Jensen, this Anzac, the redwood material, amounted to 70,000 board feet? A. Yes, sir.

Q. When did you receive the Anzac material?

A. When we first opened up the place of business, within six months, I would say, in 1954 or late 1953, I think, whenever we first took on the business.

Q. 1953 to 1954, and you paid \$10 a thousand for that material? [239]

A. That is right.

Q. Did that represent what was the 66,000 board feet that you are claiming?

A. That was included in the remanufacturing and sawed up into smaller pieces.

Q. How much of that 66,000 board feet is represented by that Anzac?

A. Well, I couldn't say. Not too much of it.

Mr. Castro: I have no further questions, your Honor.

Mr. Hilger: I have no questions.

The Court: You may step down.

Mr. Castro: Your Honor, I would ask to put a witness on out of order. He is here from Eureka.

He has come here from his private operated business.

Mr. Hilger: We have no objection to his appearing at this time.

Mr. Castro: That is why I brought it up. Mr. Musser, will you come up, please. [240]

PERCY L. MUSSER

was called as a witness on behalf of the Defendant, being first duly sworn testified as follows:

Q. (By the Court): Please state your name to the Court and to the Jury.

A. Percy L. Musser.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Musser?

A. On the outskirts of Eureka.

Q. How long have you lived in the Eureka area?

A. Since 1915.

Q. What is your business there?

A. Motor transportation broker.

Q. Do you have an office in Eureka?

A. I have an office on the corner of Third & Broadway.

Q. Are you acquainted with the Eureka Lumber Company? A. I am. I used to work for them.

Q. In June of 1956 was your office about a block away from the Eureka Lumber Company?

A. My office is located on the southeast corner of Third and Broadway. The Eureka Lumber Company's office is on the northwest corner of Com-

(Testimony of Percy L. Musser.)

mercial & Third Street with no obstructing views in between.

Q. Looking at this diagram which is on the board, Exhibit A, [241] this represents Commercial Street? A. Right.

Q. This represents Third Street?

A. Right.

Q. This represents the Eureka Lumber Company building. Now, if we went to the west or the left of that diagram to the other end of the block——

A. You would be on Broadway.

Q. You would be on Broadway, and your office is right on the corner of Broadway & Third Street?

A. Right.

Q. I show you an exhibit in the case, Defendant's Exhibit C. Are you able to identify your office in that particular photograph?

A. Yes, it shows on the corner.

Q. Would you put an X over your office?

A. (The witness indicated.)

Mr. Castro: May we mark that as X-1, your Honor, representing the office building of Mr. Musser, Exhibit C.

Q. Were you at your office on the day of the fire at the Eureka Lumber Company?

A. I was, yes.

Q. What time had you gone to work that day?

A. Approximately 6:30 in the morning.

Q. Did you remain at your office up to the time of the fire? [242]

(Testimony of Percy L. Musser.)

A. I was in my office at the time of the fire.

Q. Are you acquainted with Harold Dee Jensen?

A. Very much.

Q. Are you acquainted with Hyrum Jensen?

A. Yes.

Q. What was your first knowledge that anything unusual was taking place in the neighborhood on that day?

A. You mean at the time of the fire?

Q. Yes.

A. Well, prior to the fire I had two truck drivers that drove for Young's Commercial Transfer from Modesto in the office. I was getting ready to make a telephone call to Diebolt Lumber Company in Smith River, and we heard the explosion and I said to the boys, I said, "Gee, there——"

The Court: He doesn't want conversation, but just relate the things that took place without relating the conversation.

The Witness: I am going to tell you what happened.

The Court: No, no.

The Witness: I can't do that?

The Court: You are not going to tell anything. You just answer questions the way he asks you.

Q. (By Mr. Castro): Just tell what happened.

The Court: You heard an explosion. Go ahead. Ask the next question. [243]

Q. (By Mr. Castro): What occurred after you heard the explosion?

A. I looked around and I couldn't see anything.

(Testimony of Percy L. Musser.)

Q. Did you see Harold Dee Jensen after you heard that explosion?

A. Very shortly after he drove up in front of my office, yes.

Q. What was he driving in?

A. He was driving a GMC pickup that belonged to the Eureka Lumber Company.

Q. From what direction was he coming?

A. He was coming west on Third Street, and crossed over in front of my office.

Q. Would that be from the direction of the Eureka Lumber Company? A. It would, yes.

Q. And your office would be approximately 150 feet from the Eureka Lumber Company?

A. It would be approximately 300 feet.

Q. About 300 feet? A. Right.

Q. Would you describe the rate of travel at which you observed Mr. Harold Dee Jensen driving as he came by there?

A. When I sat in my office, my back was to the Eureka Lumber Company at that time, the way I was sitting in the office, [244] and I noticed him come up by the side window on the Third Street side of my office, and he was going very fast, and he came to a sudden stop right in front of the door.

Q. Is there a curb in front of your office?

Q. There isn't a curbing. I have poured cement there, because before I put the office there, there was quite a mudhole.

Q. Did his pickup come in contact with that area in which you had poured cement?

(Testimony of Percy L. Musser.)

A. He drove right across the top of it.

Q. Did he change his speed when he came across the top of that cement?

A. He came to a sudden stop in front of the door.

Q. Then what took place?

A. He opened the door like he was going to get out about a foot, I would say. And I was on the telephone, and he closed the door. And he must have shoved the foot throttle down to the floorboard and took off.

Q. Would you describe the rate of speed as he continued on?

A. The rate of speed wasn't very great, but the tires was sure going around.

Q. After that occurred did you hear any fire alarm sounded? A. No, I did not.

Q. After that occurred did you see that the Eureka Lumber Company building was on fire?

A. Well, I said, "What was Jensen looking for? Is the joint on fire?" [245]

The Court: That is not what he asked you. He asked you after the man drove off whether you saw the fire in the Eureka Lumber Company.

The Witness: That is what I was trying to explain to you, what I saw.

The Court: You can answer yes or no. That does not require any explanation. Either you saw a fire or you did not.

The Witness: I did see a fire.

The Court: That answers it.

(Testimony of Percy L. Musser.)

Q. (By Mr. Castro): Where was that fire, Mr. Musser?

A. On the north end of the building.

Q. On the north end of which building?

A. That building approximately in the center of it where the center wall goes through, right at the peak of the roof, because the roof is longer on one side than it is on the other.

Q. You are familiar with the Eureka Lumber Company building? A. I am.

Q. And you had been in that building prior to the fire on various occasions? A. Yes.

Q. I show you another photograph taken on August 10, 1956. Do you recognize that view?

A. Yes, I do.

Q. Is that a view from the general direction of [246] your office towards the Eureka Lumber Company? A. It is.

Q. Could you mark on that the portion of the roof where you saw the fire coming out?

A. (The witness indicated as requested.)

Mr. Castro: We will mark that Arabic number 1, your Honor, and offer the photograph in evidence as Defendant's exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit L.)

Q. (By Mr. Castro): Did you go over to see the fire or help fight the fire after you saw it was there? A. I did not.

Mr. Castro: May I show this photograph to the

(Testimony of Percy L. Musser.)

Jury, your Honor? Perhaps I had better pass the other photographs that showed the office.

The Court: Exhibit C.

Mr. Castro: Yes.

Q. Did you do anything with reference to calling the fire department after you saw that fire?

A. I did.

Q. What did you do?

A. What was the question?

The Court: What did you do.

A. I telephoned the fire department. [247]

Q. (By Mr. Castro): Then did you remain in your office? A. I did, yes.

Mr. Castro: Those are all the questions I have, your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Musser, you did not see any smoke or fire until after you had seen Mr. Harold Dee Jensen, did you?

A. No, sir, I did not.

Q. Mr. Harold Dee Jensen stopped in front of your office, appeared to be alighting from his vehicle, opened the door, and then got back in, re-closed it and took off?

A. He didn't attempt to get out. He just opened the door, then closed it, and took off.

Q. You had not been over to the Eureka Lumber Company for some three months or so prior to the fire, had you? A. No.

Q. And that was because you and Mr. Harold

(Testimony of Percy L. Musser.)

Dee Jensen had had a controversy, isn't that right?

A. Yes.

Mr. Hilger: That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Musser, have you told anything but the truth here today? [248]

A. No, sir.

Mr. Castro: I have no further questions. That is the only witness I have at this time. He is under subpoena, so will you assure him he can go back?

Mr. Hilger: I will excuse him.

The Court: You may be excused, Mr. Musser.

Mr. Hilger: At this time the Plaintiff would read into evidence the

DEPOSITION OF EUGENE L. FOX

taken in Eureka, California, on September 19, 1957.
The questions were propounded by myself to the witness.

"By Mr. Hilger: Would you state your name, please? "A. Eugene L. Fox.

"Q. Where do you reside, Mr. Fox?

"A. 1511 County Lane in Eureka.

"Q. What is your profession?

"A. I am a Certified Public Accountant.

"Q. Where do you practice that profession?

"A. Well, I'm employed by David L. Moonie and Company.

"Q. Is that a firm of Certified Public Accountants? "A. Yes, it is.

(Deposition of Eugene L. Fox.)

"Q. Where do they have their offices?

"A. At 537 G Street, Eureka. [249]

"Q. How long have you been so engaged?

"A. Seven years.

"Q. Mr. Fox, in connection with your professional work did you have occasion to take an inventory at the Eureka Lumber Company?

"A. I did.

"Q. Do you recall when that was done?

"A. It must have been about—I don't recall exactly, but it must have been about the end of July or the very first part of August.

"Q. Of what year? "A. Of '56.

"Q. Had there been a fire at the premises prior to your taking an inventory there? "A. Yes.

"Q. When you took this inventory did you make any written record of what you found?

"A. I did.

"Q. I hand you a sheaf of paper bearing the imprint of Eureka Lumber Company and in pencilled handwriting, the same being stapled together as one document and I'll ask you if that's the record that you prepared of your inventory that you have just referred to? "A. It is. [250]

"Q. Huh? "A. It is, yes.

"Q. That is your handwriting?

"A. Yes, it is."

Mr. Hilger: At this time I will ask that the handwritten inventory of Eugene L. Fox be offered as Plaintiff's next in order.

The Court: Any objection?

(Deposition of Eugene L. Fox.)

Mr. Castro: No objection.

The Court: Shall I remove it from the deposition?

Mr. Hilger: If you will.

(The inventory referred to was thereupon received in evidence and marked Plaintiff's Exhibit 19.)

"Q. In connection with your practice as a Certified Public Accountant are you often called upon to officiate at and to supervise the taking of inventory? "A. I am.

"Q. Is the taking of physical inventories generally accepted audit practice leading to the certification of a financial statement?

"The Witness: The observation of the physical inventory is standard auditing procedure. We don't always take them, but sometimes we assist or supervise, as you stated, yes. [251]

"Mr. Hilger: Now in connection with taking this particular inventory, Mr. Fox, what procedure did you follow and what did you do?

"A. I observed the inventory and actually participated in the count and made a report of the count which I am holding in my hand.

"Mr. Fox, I am handing you here a photostatic copy of a proof of loss that has been marked as plaintiff's exhibit number one in connection with the deposition of Mr. Whittet in this proceeding here, (Plaintiff's Exhibit No. 5 in this proceeding) and referring to exhibit A attached thereto, the first five pages of Exhibit A, have you compared

(Deposition of Eugene L. Fox.)

the items reflected in that list with the inventory record exhibit one with your deposition here, your handwritten inventory? “A. I have.

“Q. Is the list on exhibit A there at which you are looking, pages one through five, is that an accurate tabulation of the handwritten inventory which you prepared?

“Mr. Castro: The items of inventory?

“Mr. Hilger: Of the items, we are not referring to price now, Mr. Fox, the items and the quantity of items, is that an accurate [252] tabulation of the items and quantity of items reflected in your handwritten inventory?

“A. Substantially, yes. There are two items, one of which I can't find on my handwritten inventory.

“Q. Which item is that, Mr. Fox?

“A. Two Venta Wall Windows, two by two display unit which is fifty-four dollars.

“Q. That does not appear on your handwritten inventory?

“A. I couldn't find it there, no.

“Q. Is there any other difference respecting the listing there in exhibit A, pages one through five, which does not correlate accurately with the handwritten inventory that you prepared?

“A. Yes. On page three there is an item twenty-two pints Griffin Mark-A-Way Creme. According to my inventory I had twenty-six, so, in effect, this is understated.

“Q. You mean that exhibit A at which you are

(Deposition of Eugene L. Fox.)

looking at page three understates the quantity compared to your handwritten inventory?

“A. Yes.

“Q. Now is there any other respect in which exhibit A, pages one through five, does not [253] correlate accurately with your handwritten inventory?

“A. No, it appears to be accurate with those exceptions.

“Q. Well, it's exhibit A attached to exhibit one for the clarification of the record. And that's exhibit one with the deposition of Mr. Whittet.

“Now can you describe the condition of the items listed in pages one through five of exhibit A attached to the exhibit one to the deposition of Mr. Whittet at the time you took the inventory?

“A. They were badly smoked and in some cases they were damaged by water also. I think that pretty well covers it. Some of the sheet rock that is listed on page two was worthless, you might say, from the heat and everything. It was—especially around the edges, it was just about ready to fall apart. We were able to count it, but other than that, it was a loss.

“Q. Were any of the items partially burned?

“A. I don't believe the items listed here were, no.”

The Court: Do you wish to read the cross examination?

Mr. Castro: Just three or four lines is all I have an interest in, your Honor. [254]

(Deposition of Eugene L. Fox.)

“Q. (By Mr. Castro): What were you to get? Were you to get the value of the inventory, the condition of the inventory or the quantity of the inventory? • “The quantity.

“Q. Was that the only item you were to get?

“A. Yes.”

That is all I care to read.

Mr. Hilger: That is all we will read from the deposition of Mr. Fox, and at this time I would like to begin the reading of the deposition of Harold Dee Jensen taken in San Francisco, California, on May 11, 1957.

The Court: Is the original on file?

Mr. Hilger: I don't know. It was taken by Mr. Castro at his request. The witness is now dead and it constitutes the only method of obtaining his testimony in this proceeding.

The Court: Where is the original? Does anyone know?

Mr. Castro: No, your Honor. The reporters were Gagan & McDaniels here in San Francisco. We can certainly check with them.

The Court: Do you have a copy?

Mr. Castro: I have a copy.

The Court: Is there any objection to counsel using a copy then? [255]

Mr. Castro: No, not as to the accuracy of it, your Honor, but if there are other depositions to be read, may this be deferred until the morning? There are certain matters I think we can anticipate.

The Court: Is that possible in the preparation of your case, to take up something else now before you take up this deposition?

Mr. Hilger: Surely. We will read the deposition of Mr. H. B. Whittet taken in Eureka, California, on September 9th. I believe we can finish this one by 4:00 o'clock.

“H. B. WHITTET

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“By Mr. Hilger: State your full name, please?

“A. H. B. Whittet.

“Q. And where do you reside, Mr. Whittet?

“A. At 306 West Pratt Street in Eureka.

“Q. What is your business or occupation?

“A. Salesman.

“Q. And by whom are you employed?

“A. Western Door and Sash Company, Fifth and Cypress Streets, Oakland.

“Q. How long have you been so employed?

“A. Over five years. [256]

“Q. What territory do you cover in connection with your duties with Western Door and Sash?

“A. From Garberville, California, to Gold Beach, Oregon.

“Q. In connection with the performance of your duties have you had occasion to deal with the Eureka Lumber Company? “A. Yes.

“Q. And what have been those dealings, Mr. Whittet, from a period through 1955 and up to June of 1956?

(Deposition of H. B. Whittet.)

“A. My dealings with them have been in selling them doors and sash and windows, moldings, frames and related items.

“Q. Did you call upon their place of business in connection with your duties? “A. Yes.

“Q. And upon the occasion of those calls did you have opportunity to observe their inventory of your merchandise? “A. Yes.

“Q. Did you have occasion from, say, May or June of 1956 to be upon their premises and look at their inventory?

“A. May or June of '56? [257]

“Q. To refresh your recollection, the fire occurred there on June 25th.

“A. Yes, I would have been there during that period, definitely, uh huh.

“Mr. Hilger: Mr. Whittet, I'll show you a photostatic copy of a proof of loss referring to Exhibit A attached thereto, the first page, the items thereon beginning at the top and down to but not including two Venta wall windows and ask you look that list over.

“A. All right.

“Q. Now referring to the items that are described therein on that list, how does that compare with the inventory you observed when you were on the premises just prior to the fire?

“A. Well, with the exception of——”

At that time an objection was interposed:

“Mr. Castro: Now, just a moment. He didn't say he was on there just prior to the fire, Counsel.

(Deposition of H. B. Whittet.)

He hasn't fixed any date when he was in there.

"Mr. Hilger: His testimony has been that he would have been there during May or June of '56; upon the occasion of that visit and your observation of the inventory how did—what is the [258] comparison between what you observed and the list that you have there before you?

"A. I would have to answer that this way. I don't recall distinctly of seeing all of these doors here, for instance, the ash doors, we have twenty-three two fours, that would be an abnormal stock of that size. I don't distinctly recall seeing those doors here or at their yard. However, this would be, I would say, approximately a normal stock with the exception of that excessive amount of that one size ash door.

"Q. Well, what I am trying to ascertain, Mr. Whittet, is the comparison between this list and your observation of the inventory upon the occasion of your visit, does it compare reasonably and accurately?

"In order to clear up any uncertainty or misunderstanding, upon the occasion of your visit to the Eureka Lumber Company in connection with your duties, did you observe their inventory of your stock or the stock that sold or handled?

"A. That's right. I did. That is common practice when you go into a place of business to observe the stock that they have, but to recall exactly what was in the stock at that time would be an impossibility. [259]

(Deposition of H. B. Whittet.)

“Q. Well, you have been shown a list there, Mr. Whittet. How does that list compare with your recollection of your observation of the inventory?

“If by reference to the list before you are able to state any comparison between that list and your recollection of actual observations of inventory, would you so state?

“What’s your best recollection of what was there, what items of merchandise?

“A. Well, to the best of my recollection, as I said in the beginning, with the exception of this—I recall the stock that they normally carried there. Insofar as I recall, it was about in proportion to about what it normally was which would be a fairly well rounded stock of mahogany doors, some sash, some door jambs, some other doors including one panel one light and French doors, but in precisely what quantity, I couldn’t say. We’ll state that their normal stock would run anywhere from fifty to one hundred doors be what they would normally carry.

“Q. Now in clarifying that answer, you were asked as to your recollection of your observations of their stock. By ‘normal’ do you mean that it was their average stock that they carried basically?

“To further pin that down, Mr. Whittet, are you referring to your visit that you have alluded to in May of ’56 or June of ’56? “A. Yes.

“Q. Now, then, Mr. Whittet, in connection with your duties as salesman for the Western Door and

(Deposition of H. B. Whittet.)

Sash, are you familiar with the prices of the merchandise carried by your firm?

“A. Yes, I am.

“Q. And you were familiar with those prices during the period of June of 1956?

“A. I was very familiar with them at that time. There have been some price changes, however, since then and I do not maintain the old price files. There are some that I can—that I can recall, but that could be very easily established what the price was at that time, definitely what they were.”

Beginning on page 11 at line 20:

“Q. Now, then, are you familiar as a result of your experience in the field of marketing door and sash with the market price and the general market for that type of product here in Humboldt County and Del Norte County? [261]

“A. Yes, I am.

“Q. And were you familiar with those prices and market values in June of 1956? “A. Yes.

“Q. All right. Mr. Whittet, would you give us your opinion as to the reasonable market value on a wholesale basis of the items previously referred to on page one of Exhibit A at June of 1956?

“Mr. Castro: You are talking about the total items from the top of the page down to the two Venta wall windows?

“Mr. Hilger: To but not including.

“The Witness: I would say that they are very nearly accurate.

(Deposition of H. B. Whittet.)

“Q. You mean the values set forth in Exhibit A?

“A. It would seem to me to be very fair and very close, very close. Each item would have to be checked accurately for me to say that it’s absolutely accurate, but certainly it’s very close.”

Mr. Castro: There are a few questions on cross examination I could read, your Honor. These are cross examination questions.

“Q. (By Mr. Castro): When were you first [262] contacted concerning appearing as a witness in this matter?”

Mr. Hilger: I will object as I did at the deposition, your Honor.

The Court: Is that the only question you objected to? I will overrule the objection.

“A. I don’t know what day it was.

“Q. Approximately?

“A. Let me think. I believe it was about ten days ago.

“Q. Who contacted you?

“A. Mr. H. M. Jensen.

“Q. And since that time have you been requested to produce any invoices of the Western Door and Cash Company? “A. No.

“Q. At any time from the fire of June 25th, 1956, up to the present time have you been requested by H. M. Jensen, Harold Dee Jensen, Counsel Fred Hilger to produce any Western Door and Sash invoices? “A. No.

(Deposition of H. B. Whittet.)

“Q. And your office is maintained here in the City of Eureka? “A. Yes. [263]

“Q. And it has been maintained here for approximately five years? “A. Right.”

Then at page 14, line 7.

Mr. Hilger: I would request the Court if the first part of that cross examination is to be used, the remaining beginning at page 13 about line 16 also be read.

Mr. Castro: Certainly. I will be happy to read it:

“Q. And your firm is listed in the telephone book, is it not?

“A. Yes. I beg your pardon there. The Western Door and Sash Company is not listed here in Eureka but I am.

“Q. You are listed?

“A. I am their agent.

“Q. You’re listed as agent for them?

“A. Not in the book, it’s not shown as agent for them, I’m not shown as agent for them.

“Q. And do you advertise as an agent or representative for the Western Door and Sash Company?

“A. You mean through the media of newspapers and such?

“Q. Or any other way? “A. No. [264]

“Q. How do people know that you’re in business here?

“A. Well, I call on them approximately once a week. It’s pretty hard for them to miss me.

(Deposition of H. B. Whittet.)

“Q. Now do you have a record of what you sold to the Eureka Lumber Company from 1956?

“A. No, I do not.

“Q. Would the Western Door and Sash Company have a record of what you sold to the Eureka Lumber Company during 1956? “A. Yes.

“Q. This morning I was handed a series of invoices of the Western Door and Sash Company consisting of one—seven invoices. Have you seen these invoices?

“A. I don't know whether I have or not.

“Q. Would you look at them. Have you examined those invoices? “A. Yes.

“Q. For the purposes of the record, those invoices may be identified as invoices entitled date billed, February 14th, '56, number 05073; invoice bearing date sold January 25th, 1956, being number 03567; invoice date sold one twenty-three fifty-six, number 03657; invoice date [255] one twenty-three fifty-six, being number 03678; invoice, same date being number 03656; invoice date sold December 28, 1955, being invoice number 01428; invoice twelve nineteen fifty-five, being invoice number 0702.

“You have examined each of those invoices?

“A. Uh huh.

“Q. Do you know of any other invoices?

“A. Yes.

“Q. And do you have any invoices in your records in your office?

(Deposition of H. B. Whittet.)

“A. No. I do not keep the invoices.

“Q. Are these true copies of the invoices from the Western Door and Sash Company?

“A. Yes.

“Q. On the face of the invoice is written fifty per cent. Did you notice that? “A. Yes.

“Q. What is the significance of that term fifty per cent?

“A. The price is based on what we term a wholesale list price which appears in our catalog and fifty per cent is the discount to the dealer, our customer.”

Mr. Castro: I would like to offer in evidence [266] in the morning the invoices referred to in this examination with our accountant, Mr. Stearns, who is going over them.

The Court: Very well.

Mr. Castro: Page 17, line 8:

“Q. On this last occasion that you were there before the fire in May or June of 1956, where did you go? “A. I don't recall exactly.

“Q. Did you see anybody on that occasion?

“A. I don't recall that.

“Q. Did you take an order on that occasion?

“A. I don't recall that either.

“Q. At any time did you take any inventory at the Eureka Lumber Company in 1956?

“A. No, no.

“Q. Did you go to the Eureka Lumber Company following the fire of June 25th, 1956?

(Deposition of H. B. Whittet.)

“A. No.

“Q. Did you have—strike that. Was there an outstanding account of either payable or receivable between Western Door and Sash Company and the Eureka Lumber Company in June of 1956?

“A. Yes.

“Q. And in what amount?

“A. I don’t recall exactly. I believe it was [267] eight hundred and some dollars.

“Q. And who would have the record of that account?

“A. Western Door and Sash Company.”

Mr. Hilger: The redirect examination by Mr. Hilger:

“Q. Having reference to the invoices that have been referred to here, I believe the date of the first one is December 19th, 1955. Do you recall whether or not at that date or upon the occasion of that purchase or, I’ll state it this way, just prior to that purchase was there any then existing inventory of your merchandise in the Eureka Lumber Company? “A. Yes, there was, yes.

“Q. That was prior to the purchases reflected in these invoices? “A. Right.”

Mr. Castro: Will you read the question and answer by me there?

Mr. Hilger: Yes. On further recross Mr. Castro asks, “Do you know the amount of the existing inventory in December of 1955? “A. No.”

The Court: It is warm in here. We try to get

some kind of cooling here when we get humid days. [268] There are some fans, but like some other Government equipment, they don't seem to work. I am explaining this to you because I notice some of you look as if you need some fresh air. If we open the windows we get noise from the street. Many years ago when this addition was built the Government's architect, who was in Washington, designed a very beautiful courtroom, as you can see, but he apparently had no practical experience, and so he designed the courtroom on the outside of the building instead of the inside of the building, as a result of which we get all the noise and we can't open the windows to get fresh air in. However, we get used to it. Will you come back tomorrow morning at 10:00 o'clock, please.

(Whereupon, an adjournment was taken until September 26, 1957, at 10:00 o'clock a.m.) [269]

Thursday, September 26, 1957—10:00 O'Clock A.M.

The Clerk: Jensen vs. Boston Insurance Company for further trial.

Mr. Hilger: Ready for the Plaintiff.

Mr. Castro: Ready for the Defendant.

Mr. Hilger: At this time, your Honor, the Plaintiff would read into evidence the deposition of Harold Dee Jensen taken on May 11, 1957. On that occasion in San Francisco the questioning was by Mr. Castro of Mr. Harold Dee Jensen, the witness.

"HAROLD DEE JENSEN

"called as a witness by the defendant and third party plaintiff, Boston Insurance Company, being first duly sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

"Examination

"Q. (By Mr. Castro): Would you state your name in full, Mr. Jensen?

"A. Harold Dee Jensen.

"Q. And what is your age? "A. 37.

"Q. Are you married or single?

"A. Single. [270]

"Q. Have you been known by any other name?

"A. No.

"Q. Haven't used any other name?

"A. No.

"Q. Either your first name or family name?

"A. No.

"Q. Where do you reside, or live, at the present time? "A. 2434 E Street, Eureka.

"Q. And how long have you made your home at that location?

"A. Oh, approximately a year.

"Q. When did you first come to live in Eureka?

"A. Oh, '48 or '49, as near as I can recall.

"Q. And you have lived there continuously since that time? "A. Yes.

"Q. What is your occupation?

"A. I am selling lumber right now.

"Q. How long have you followed that work?

"A. Oh, when I first started in, about 1942,

(Deposition of Harold Dee Jensen.)

when I first started in the lumber business; some has been manufacture, some selling, some hauling.

“Q. And are you self-employed, or are you working for some outfit?

“A. Self-employed right now.

“Q. How long have you been self-employed?

“A. Oh, about the last two months. [271]

“Q. Whom did you last work for?

“A. Eureka Lumber Company.

“Q. And when did you start to work for the Eureka Lumber Company?

“A. I couldn't say right offhand. I think I worked for about six months when Cable had it, and then I worked continuously up until the time of the fire, and partly after the fire, when the Eureka Lumber Company had it.

“Q. Who was Cable?

“A. He was in the Eureka Lumber Company.

“Q. What is his first name or initial?

“A. Well, I think it was a corporation. I think it was Alert Lumber Company, Incorporated.

“Q. Where is your office at the present time?

“A. I am using two different offices; I am using one at 8343 Clarence in San Gabriel and 2434 E Street, Eureka. They are both just home phones.

“Q. Now, since '42, have you followed any line of work other than the lumber business?

“A. No.

“Q. Have you been in the production end of lumber? “A. Yes.

“Q. And when was that?

(Deposition of Harold Dee Jensen.)

"A. Oh, in '42—I can't recall exact dates, but it's been intermittent since '42 until, I think, '53 was the last. [272]

"Q. And where did you last engage in the production of lumber? "A. Eureka.

"Q. Were you self-employed or working for someone else at that time?

"A. The last I was working for someone.

"Q. And who was that?

"A. Alert Lumber Company. They were going under the Eureka Lumber Company; that's a subsidiary of the Alert.

"Q. Are you related to Hyrum Jensen?

"A. Yes.

"Q. And what is your relationship?

"A. He is my father.

"Q. Did you ever operate a mill for your father?

"A. I leased one from him.

"Q. Where was it located?

"A. On the Ole Hansen Road.

"Q. Where is that road located?

"A. Oh, it's between Arcata and Eureka.

"Q. And what was the name of the mill?

"A. Sequoia Lumber Company.

"Q. Who was the owner of the mill?

"A. H. M. Jensen.

"Q. And who was the owner of the equipment?

"A. H. M. Jensen. [273]

"Q. Was that a written agreement or an oral agreement? "A. Written agreement.

(Deposition of Harold Dee Jensen.)

“Q. Do you have the original written agreement or a copy of it? “A. Not now I don’t.

“Q. Did you have the original agreement or a copy of it? “A. You say did I have?

“Q. Yes. “A. Yes.

“Q. What became of your document?

“A. I don’t know. I think it was in the fire.

“Q. Which fire do you refer to?

“A. The one of the Eureka Lumber Company.

“Q. Is it the fire of June 25, 1956?

“A. Yes, that’s right.

“Q. During what period did you have the lease agreement with Hyrum Jensen?

“A. I can’t recall that offhand.

“Q. Tell me approximately.

“A. I think it was between ’51 and ’53, approximately.

“Q. Now, did you have any other lease agreements with Hyrum Jensen?

“A. No, not that I recall.

“Q. That is the only one you have had with him? “A. Yes. [274]

“Q. Have you had any employers other than the Eureka Lumber Company, in the last five years?

“A. Yes.

“Q. Who?

“A. Let’s see, five years—no, not within the last five years.

“Q. That would take you back to a period of about 1952.

“A. Yes. I haven’t had any since then.

(Deposition of Harold Dee Jensen.)

“Q. When did you first become acquainted with King Cable?

“A. I think about in 1951, approximately.

“Q. And did you have any business relations with him thereafter? “A. Yes.

“Q. What was your first business relation?

“A. Sold him lumber.

“Q. And was that as a salesman, or was that as operating the mill?

“A. I can't remember. I have to go to the records on that to make certain.

“Q. Do you have records to reflect that situation? “A. Not now.

“Q. What has become of them?

“A. They were destroyed in the same fire.

“Q. That is the fire of June 25, 1956?

“A. Right. [275]

“Q. What other business relationship did you have with Mr. Cable, apart from selling some lumber?

“A. Oh, borrowed money from him. I had a contract for him to purchase all the lumber from Sequoia Lumber Company.

“Q. And as far as the date of this fire, June 25, 1956, did you have any business relationship with Mr. Cable? “A. No.

“Q. Had you repaid the moneys which he had loaned you? “A. Yes.

“Q. And was there any contract in existence for the purchase of lumber by Mr. Cable?

“A. No.

(Deposition of Harold Dee Jensen.)

“Q. When did that terminate?

“A. I’d have to check the records there, too, which I don’t have. I don’t know.

“Q. What record do you refer to?

“A. I’d have to check the contract. The fact is, it is on file, I am sure, in the courthouse in Eureka.

“Q. Where?

“A. The Recorder’s Office or where——

“Mr. Hilger: I would like to observe for the record that all of those contracts, leases, purchases and other documents relating to their transactions between Alert Lumber Company are on record in the Recorder’s office in Humboldt County. [276]

“Q. (By Mr. Castro): Following the fire of June 25, 1956, did you receive a letter addressed to you requesting you to appear for examination under oath in Eureka? “A. I did not.

“Q. Were you advised by Hyrum Jensen that such a letter had been written to him and to you?

“A. He said one had been written to him, but not to me.

“Q. And who told you it had been written to him, but not to you?

“A. He did. He didn’t say that it hadn’t been written to me; he just said that he had one. There was no mention whatever.

“Q. Did you see that letter?

“A. No, I didn’t.

“Q. Did he show it to you? “A. No.

“Q. And did you have any other discussion with him on that subject? “A. No.

(Deposition of Harold Dee Jensen.)

“Q. Did he tell you about receiving the letter prior to the examination under oath taking place?

“A. I don’t remember.

“Mr. Hilger: What letter are we referring to, and when? Is it the same letter about which your previous question was directed? [277]

“Mr. Castro: That is correct.

“Mr. Hilger: Objected to as asked and answered.

“Q. (By Mr. Castro): Your answer is you don’t know? “A. Yes.

“Q. On the morning of October 12, 1956, did you see Hyrum Jensen in the city of Eureka?

“A. I couldn’t say.

“Q. Where were you living at that time?

“A. 2434 E Street.

“Q. Is that the home of Hyrum Jensen?

“A. Yes.

“Q. How long have you made your home at that location?

“A. Well, from the time he moved in there. I don’t know the exact dates on it.

“Q. And you were living there on October 12, 1956, weren’t you?

“A. Yes, but I couldn’t say whether I was home or whether I was out on a truck, or I was completely out of the town or not; I don’t know.

“Q. What was your employment at that time?

“A. October? I didn’t have any at that time.

“Q. How long had you been without employment?

“A. I had just been off—I had just been em-

(Deposition of Harold Dee Jensen.)

ployed off and on with something to do with the Eureka Lumber Company, which was fairly limited. [278]

“Q. For what period of time?

“A. From June until approximately two months ago.

“Q. On the morning of October 12, 1956, didn't you have a conversation with Hyrum Jensen concerning examination under oath that was to take place that morning in Eureka?

“A. I don't recall any October 12th. I could not place that date along with any other day. There was no significance.

“Q. Do you recall any conversation on that subject with Mr. Hyrum Jensen?

“A. No, I don't.

“Q. Did Mr. Hyrum Jensen ask you to attend an examination under oath on October 12, 1956?

“A. There was no conversation; he didn't ask me.

“Q. But you—strike that. Did you tell Hyrum Jensen that you would not attend the examination under oath? “A. I did not.

“Q. Have you ever been convicted of a felony?

“A. No.

“Mr. Castro: This morning we have asked for the production of certain documents. Have you brought any of those documents, counsel?

“Mr. Hill: No.

“Mr. Castro: Would you state if there is any reason for not producing them? [279]

(Deposition of Harold Dee Jensen.)

"Mr. Hill: Mr. Jensen informed me when I advised him of your request that he did not have the documents, or that the documents were destroyed in the fire of June 25, 1956. With particular reference to your demand, Mr. Castro, you asked for copies of his income tax returns for the years '51 through '57. Mr. Jensen informed me that those were in a foot locker; is that correct, Mr. Jensen?

"The Witness: That's right. 1957 is not due yet until May of next year.

"Mr. Hill: That's right. The same is true as to whatever books and records he would have regarding his own business. They were in the same place.

"Mr. Hilger: May I observe for the record that Mr. Stearns of Pete, Marwich & Mitchell went through all the available records down there, including various documents, personal records as well as personal business records, in my presence.

"Q. (By Mr. Castro): Now, did you make out a tax return for the United States Government in 1951? "A. Yes.

"Q. And for each of the calendar years of 1952 through 1956? "A. That's right.

"Q. Do you have a copy of your 1956 tax return? [280] "A. No, I don't, not now.

"Q. Where is it?

"A. Well, it was in the office desk. It was there after the fire, but it turned up missing.

"Q. Your 1956 tax return was destroyed in the fire? "A. No, it was not.

"Q. What became of it?

(Deposition of Harold Dee Jensen.)

“A. I don’t know.

“Q. Where was it the last time you saw it?

“A. In a desk drawer in my desk.

“Q. Where?

“A. In the Eureka Lumber Company building.

“Q. When was that?

“A. Four or five days after the fire.

“Q. Your 1956 tax return was not due until April 15, 1957. Had you made it out in 1956?

“A. Excuse me. That was a ’55 tax return I had reference to.

“Q. Do you have a copy of your 1956 tax return?”

The Court: Mr. Hilger, I do not like to interrupt you, but what has all that got to do with this case? I appreciate there have been some statements made by counsel, but I do not see the relationship of this examination to the claim of the plaintiff on this insurance policy.

Mr. Hilger: There has been certain issues raised in [281] the opening statement by the defendant. There have been facts testified to by a witness placed upon the stand by the defendant regarding the conduct of Harold Dee Jensen.

The Court: That may be material, yes, but his own income tax returns and what he did with his own documents, I do not see that that has anything to do with your case.

Mr. Hilger: I am quite in agreement that it is somewhat irrelevant. However, this witness is dead. This is the means by which he can testify. Out of

fairness to the trier of the fact here, it is difficult enough to follow a deposition at best, but if it is broken up in little segments and I read a part and Mr. Castro reads a part, it begins not to make sense, and in the interest of justice I would like to present the entire deposition as it relates to this policy. There are some few pages later on that refer to another matter which might be omitted. If this is not offered at this time, it will be offered later on.

The Court: Of course, the only thing the defendant has put in has been out of order because of the necessities, the circumstances at the time. But you can answer and read this deposition by way of rebuttal, if you wish, if it becomes necessary, but it is not clear to me at all how this is part of the plaintiff's case.

Mr. Hilger: It is not all part of the plaintiff's case, your Honor. I appreciate that. It is only as a matter of [282] trying to maintain some continuity here in the presentation of the testimony of Mr. Harold Dee Jensen that I read it. I can skip over to various portions that I have marked here that may be material.

The Court: Since I haven't it in front of me, it seems to me quite a lengthy deposition.

Mr. Hilger: It goes on forever, about two-and-a-half hours reading time, but, as I say, it is the only way we can get the testimony of Mr. Jensen before the Court. I did not appear for Mr. Harold Dee Jensen in the first instance. I now represent his estate, and in defense of Mr. Jensen——

The Court: I do not know that there is anything

so far in the record for him to defend himself against. That is why I am curious. I do not want to tell you how to present your case, and if you feel that it is essential at this time I do not feel that the Court should interpose itself against your wishes in that regard, but you are only putting on the plaintiff's case now, and there may or may not be any need to read this deposition, depending upon what the defendant has to offer. At the present time your affirmative case deals only with the proof of fire, the dollar amount of the loss, and I do not know why you have to spend this time in reading this long deposition simply because of some statements made by opposing counsel, until such time as it appears there is evidence concerning which this deposition might be properly rebuttable. I am not intending to foreclose [283] you in any way from reading this. I just do not see at the moment in the order of proof that there is any necessity for your reading it.

Mr. Hilger: It is the position of the plaintiff and also the third party defendant, the Estate of Harold Dee Jensen, that we present all the facts that are at all material regarding this matter. It is a difficult matter to go through this deposition and pick out the small part that is relevant but still have the matter be intelligible to the Jury.

The Court: I am not suggesting to you, and I do not want to take undue time in connection with it, that you pick out parts of it. If it has to do with the amount of the claim of the plaintiff that is involved, which you feel is proper corroborative evi-

dence, of course, that would be perfectly proper, but I do not think there is any need for you to read the deposition concerning the activities of this deceased son of the plaintiff at this point, merely because of the fact that some statements have been made by opposing counsel concerning it. I think you have a perfect right to present that at the appropriate time, and I am not intending in any way to shut you off in presenting it. I just do not see why we have to spend a couple of hours in going through this deposition at this time. That is all.

Mr. Hilger: I felt at the time the deposition was 90% irrelevant, and I do now, but I wanted to make a full disclosure and allow this dead person to speak as fully as can be [284] permitted.

The Court: If it becomes necessary and appropriate, you have the right to present that, Mr. Hilger, and I would not deprive you of that right. I just do not see how it is part of your affirmative case at this time.

Mr. Hilger: In view of the Court's remarks, I can and am prepared to read various other depositions and at the morning recess I will run through the deposition of Harold Dee Jensen to see what matters the Court might want to receive at this time.

The Court: I want to make it clear, so the record is clear, that there is reserved to you the right to present this deposition in full or in part at any appropriate time in the trial of the case.

Mr. Hilger: Thank you, your Honor.

At this time we would read into the record and

in evidence the deposition of Chester Franklin Brown, taken in Eureka, California, on September 19, 1957. [285]

“CHESTER FRANKLIN BROWN

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Direct Examination”

“Q. (By Mr. Hilger): Would you state your name, please?

“A. Chester Franklin Brown.

“Q. Where do you reside, Mr. Brown?

“A. Residence or business?

“Q. Residence.

“A. Residence, Old Arcata Road, Eureka, Route 1.

“Q. And what is your business, Mr. Brown?

“A. Electrical contractor.

“Q. And where do you carry on that business?

“A. 52 West Fifth, Eureka, California.

“Q. How long have you been in that business?

“A. Approximately four years.

“Q. That's here in the City of Eureka?

“A. Yes, sir.

“Q. Have you had any electrical experience prior to establishing your business four years ago?

“A. Just twenty six years.

“Q. Huh?

“A. Twenty six years all told.

“Q. And you were engaged as an electrical contractor [286] in Humboldt County in the City of Eureka in June of 1956? “A. Yes, sir.

(Deposition of Chester Franklin Brown.)

“Q. As a result of your activity in that business and your experience in the electrical contracting field, are you familiar with the market value of electric motors in Humboldt County, in this area?

“A. I think so.

“Q. Were you familiar with the market price and fair market value of electric motors in June of 1956 in Humboldt County?

“A. I think so.

“Q. In your opinion, Mr. Brown, what would be the fair market value in June of 1956 in Humboldt County of one used twenty five horse power electric motor and one fifty horse power used electric motor?

“Mr. Castro: Just a moment. Would you identify them on the inventory, counsel, so we will know where you are?

“Mr. Hilger: Yes, I will. Looking at page five of exhibit A attached to exhibit one of the—— (The photostatic copy of the proof of loss.)

“Mr. Castro: (Int’g) I suggest that we get the witness’ independent statement concerning these items.

“Mr. Hilger: All right.

“Mr. Castro: For the purpose of the record so I can [287] follow you, I would like to know which items you are referring to.

“Mr. Hilger: Page five of exhibit A attached to exhibit one on the deposition of Whittet, approximately an inch and a half from the bottom of the list.

(Deposition of Chester Franklin Brown.)

“Mr. Castro: Eight or nine items from the bottom?

“Mr. Hilger: Right.

“Mr. Castro: I see.

“The Witness: Can I refer to some pamphlet on this?

“Mr. Hilger: Well, if you have an opinion based upon your experience in the field.

“The Witness: It would be impossible for me to quote you the price of the motor without first knowing, without looking it up, there's too much different types of motors and everything to trust my memory at the exact amount.

“Q. Well, we have the horse power, twenty five horse power and fifty horse power. “A. Yes.

“Q. And given an R.P.M. of twelve hundred R.P.M. and given a brand of General Electric.

“A. All motors for General Electric, any of the leading brand motors are the same price based on the National Price Book, and a fifty horse power motor is, I believe, approximately twelve hundred dollars retail, [288] the twelve hundred R.P.M.

“Mr. Castro: You're talking about a new motor?

“The Witness: That's what we——

“Mr. Castro: (Int'g) The question is a used motor, as I understand it.

“The Witness: We'd base our used motor on the price of a new one. I mean, not exactly the same, but we figure it fifty or seventy five or whatever degree the motor is valued at, a motor that is in good shape, a used motor will run approximately

(Deposition of Chester Franklin Brown.)

seventy five percent or a little better than the price of a new one. The price of the motor actually that's being used is no way decreased, the valuation of it.

"Mr. Hilger: What would be your opinion as to the value of a used General Electric twelve hundred R.P.M. horse power motor in June of 1956?

"A. Well, a free estimate, I'd say close to a thousand dollars.

"Mr. Castro: What do you mean by 'a free estimate'?

"A. I don't have any papers, what can I say?

"Mr. Hilger: Would you like to make a few computations and get out your paper and do so if you wish so and we can have an accurate statement of what your opinion of the value would be.

"A. My opinion of it is a thousand dollars."

Mr. Hilger: Do you wish to——

Mr. Castro: No, go right ahead.

"The Witness: May I clarify that?

"Mr. Hilger: If you can give us an opinion, Mr. Brown, of the value of the used motors.

"A. A motor that is——

"Q. (Int'g) Of the fifty horse power capacity, standard brand, twelve hundred R.P.M. in June of 1956?

"A. If the motor is runable it's approximately seventy five to ninety percent of the new value.

"Q. That would be the new value?

"A. Be around twelve hundred dollars.

"Q. In applying the same facts to a twenty five horse power motor, what would be your opinion as

(Deposition of Chester Franklin Brown.)

to the value of a twenty five horse power motor, the same description as the fifty, in June of 1956?

“A. New price on it is approximately eight hundred to eight hundred and fifty dollars.

“Q. And would the same percentage of new value hold true?

“A. Anything in multiple horse power is based on those basis. In dealing in used motors we find that that's what we have to gauge it from is we base it on the new prices and percentage of the use from the valuation of the motor which, if it's in use, it's [290] approximately as good as a new one. There is no such thing as a book price on a used motor.”

The Court: Do you wish to read the cross examination?

Mr. Castro: Yes, your Honor, if I may. This is the cross examination of the witness Brown on September 19th of this year.

“Q. (By Mr. Castro): You're familiar with the handling of new motors? “A. Yes, sir.

“Q. The purchase of them from wholesalers and as a retailer? “A. I am a retailer.

“Q. As a retailer when you purchase your new motor do you get a percentage off the retail price?

“A. Yes, sir.

“Q. And what percentage do you get off of the retail price?

“A. Thirty three percent.

“Q. So that if you bought a brand new fifty horse power electric motor at twelve hundred dol-

(Deposition of Chester Franklin Brown.)

lars, you, as a retailer, would be able to buy it at thirty three percent less?

“A. Right, sir.

“Q. Or approximately eight hundred dollars?

“A. Right, sir.

“Q. And the same is true if you purchased a twenty five horse power electric motor?

“A. Would be the same proceeding.

“Q. Now did you see the twenty five horse power motor that Mr. Hilger asked you about, asked you the questions about?

“A. No, sir.

“Q. Did you see the fifty horse power motor that Mr. Hilger asked you the questions about?

“A. No, sir, no, sir.

“Q. Do you know whether either one of those motors was in a runable condition?

“A. No, sir.

“Q. Do you know whether either one of those motors required repairs? “A. No, sir.

“Q. Do you know the condition of either one of those motors? “A. No, sir.

“Q. Were you asked to inspect either of those motors after the fire? “A. No, sir.

“Q. Did you inspect either one of those motors after the fire? “A. No, sir.” [292]

Mr. Hilger: At this time, we would read into evidence the deposition of Paul Henning taken in Eureka, California, on September 19, 1957.

No. 15820

United States
Court of Appeals
for the Ninth Circuit

BOSTON INSURANCE COMPANY, a corpora-
tion, Appellant,

vs.

HYRUM JENSEN, individually and doing busi-
ness as Eureka Lumber Company, Appellee.

Transcript of Record

(In Two Volumes)

Volume II.

(Pages 301 to 610, Inclusive)

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED

FEB 25 1958

PAUL P. O'BRIEN, CLERK

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for the Northern District of California,
Northern Division

“PAUL HENNING

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Q. (By Mr. Hilger): Would you state your name, please? “A. Paul Henning.

“Q. Where do you reside, Mr. Henning?

“A. 1534 Harrison Avenue, Eureka.

“Q. What is your trade or occupation?

“A. Manager of the Rice Supply Company.

“Q. Where do you have your office for that work? “A. Number One Second Street.

“Q. Is that a branch office of a larger outfit?

“A. Yes, it is.

“Q. You maintain the invoice records, that sort of thing, for your sales here at this office or is that done elsewhere?

“A. That's done in the San Rafael office.

“Q. What type of merchandise does your firm sell? “A. Building materials.

“Q. Well, would you give us a few examples of items that the—the majority of items that would be included [293] in your line?

“A. Well, almost anything that is used in the construction of a building, plywood, roofing, paint, anything that would go in the construction of a building.

“Q. Does that include builder's hardware?

“A. Builder's hardware, floor coverings.

“Q. Would it include sheet rock?

“A. Sheet rock.

“Q. In the conduct of your business have you

(Deposition of Paul Henning.)

had occasion to deal with the Eureka Lumber Company? “A. Yes, we did.

“Q. What? “A. Yes, we did.

“Q. Was he a customer of your firm?

“A. Yes, he was.

“Q. What basis do you make sales on, wholesale or retail? “A. Wholesale only.

“Q. And that was the basis of your sales to the Eureka Lumber Company?

“A. Yes, it was.

“Q. You have been asked to provide certain—or, rather, provide invoices covering the purchases of the Eureka Lumber Company from your firm?

“A. Yes. [294]

“Q. And you have handed me a sheaf of invoices. Are those the invoices covering the sales to the Eureka Lumber Company?

“A. Yes, they are.

“Q. Now do you know what period these apply to?

“A. Yes. They apply from the first—they apply to the first six months of 1956.

“Q. Did you make sales to the Eureka Lumber Company prior to 1956? “A. Yes, we did.

“Q. Have you ever been in the Eureka Lumber Company warehouse plant or building prior to the date of the fire? “A. Yes.

“Q. Did you often go there?

“A. Approximately once a month.

“Q. Did that begin prior to 1956?

“A. Yes, it did.

(Deposition of Paul Henning.)

“Q. And when was the last time before the fire that you were in the plant or warehouse of the Eureka Lumber Company?

“A. Approximately a week before.

“Q. And at that time what part of the premises did you visit?

“A. Oh, the main building, the main office.

“Q. Did you go into their warehouse or——

“A. (Int’g.) Yes, it was part of their main building.

“Q. Did you observe any of their stock at that time? A. Yes.

“Q. How long have you been employed with the Rice Supply Company?

“A. Four years with Rice Supply.

“Q. Has that been in Eureka?

“A. Yes, uh huh.

“Q. What line were you in before then?

“A. I was with the J. B. Rice Company, which was a retail branch prior to that.

“Q. Dealing in the same merchandise?

“A. Same merchandise.

“Q. As the result of your experience in your company were you familiar with the market values of the materials which your company sold?

“A. Yes.

“Q. In the Eureka area in June of 1956?

“A. Yes.

“Q. Let’s see. Who has the exhibit? Now I am going to show you the photostatic copy of a proof of loss marked as plaintiff’s exhibit one in

(Deposition of Paul Henning.)

connection with the affidavit of Mr. Whittet, and refer to the Exhibit A attached to it. Looking at page one of the exhibit, which of those items on page one, if any, would have [296] been supplied through your firm or carried by your firm?

“A. Well, possibly the last item, the medicine cabinet.

“Q. Your company carries and sells medicine chests and cabinets?

“A. Yes, we do.

“Mr. Castro: New or used?

“The Witness: New, when we sell them.

“Mr. Castro: This is indicated as a used one.

“Mr. Hilger: Is that correct?

“A. Yes, it does say used. We don't deal in any used merchandise, it's all new.

“Q. All right. Now refer to page two of Exhibit A and tell us if there is any of the items on that page that your firm ordinarily carries and supplies to customers?

“A. I might state this sheet rock on here.

“Q. That's about the middle of the page?

“A. That's the middle of the sheet. Now we don't supply it ourselves, but we are distributors for the Fibreboard Paper Products and we handle the billing—not the billing, but we handle the sales of it, but the bills are direct from Fibreboard Paper Products.

“Q. Did you make any sales of that product to Eureka Lumber Company just prior to the fire?

“A. We have sold them LCL. In other words,

(Deposition of Paul Henning.)

a small shipment, we stock it in the warehouse and if they pick it up from us it's an LCL shipment, but normally it's bought in full cars directly from the Fibreboard people.

"Q. Do you have any personal recollection or knowledge of any sale of sheet rock or arrival of a sheet rock shipment that Eureka Lumber Company had just prior to the fire?

"A. Yes. They received a carload of rock from Fibreboard approximately thirty days, I'd say, or within thirty days prior to the fire.

"Q. How many sheets would be in a carload of sheet rock?

"A. A carload of sheet rock is between twelve hundred and fourteen hundred sheets.

"Q. Then are you familiar with the price of the sheet rock and value of sheet rock in June of 1956?

"A. Yes, I am. The LCL price of sheet rock then was fifty-four fifty a thousand.

"Q. Fifty-four dollars and fifty cents a board foot?

"A. Per thousand square feet, and the LCL or the sheet rock that would have been picked up out of our warehouse, well, that's what it would have been, fifty-four fifty; if they had got it in carloads it would have been forty-seven fifty. [298]

"Q. Per thousand?

"A. Per thousand square feet.

"Q. Per thousand square feet, that's not board feet? A. That's square feet.

(Deposition of Paul Henning.)

“Q. How many square feet are there in a sheet?

“A. Thirty-two square feet, thirty-two square feet per sheet, that is a four by eight piece.

“Q. You say the carload price is——

“A. (Int’g.) Forty-seven fifty per thousand.

“Q. Four and three-quarters cents per foot?

“A. Yes.

“Q. That would produce a price of or a value of a dollar fifty two per sheet, is that a reasonable accurate price for value at that time?

“A. That would be correct.

“Q. Now, then, are there any other items, referring to page two of Exhibit A, which your firm deals or would have supplied? A. No.

“Q. Now referring to page three of Exhibit A at which you are looking, are there any items on page three that your firm deals in or would have supplied? A. The last three items.

“Q. That would be Firzite and Pabco?

“A. Exterior gloss paint. [299]

“Q. Are you familiar with the prices and values of those items in June of 1956? A. Yes.

“Q. And what would be the value of the Firzite at that time?

“A. Oh, it’s about correct what they have there.

“Q. What is that value?

“A. Two dollars and fifty cents.

“Q. The Pabco white, five-one-o-one exterior gloss, what would be the value or price of that item in June of ’56?

“A. That would be two dollars.

(Deposition of Paul Henning.)

"Q. That's for the unit, a quart?

"A. Per quart, per item, per each.

"Q. Per quart. No other items on page three that your firm supplies? A. No.

"Q. Now then refer to page four of the exhibit. Are there any items that your firm deals in or would have supplied on that page?

"A. That is, I think all of this is ours.

"Q. Well, when you say 'all of this' would you start with the first item on that page reading from the top which your firm deals in or would have supplied?

"A. Well, the first item is shellac. [300]

"Q. What would be the value of that shellac in June of 1956?

"A. That shellac would be valued at five dollars per gallon.

"Q. You're referring to the next item that you would have supplied or which you deal in?

"A. Durham's Water Putty at sixty cents a pound which is about right. And the next item is six quarts of Texalite Paste Speckling putty at one dollar which would be correct. Six quarts of Texalite Sheet Rock sealer at a dollar which would be correct. Two pints of Weldwood Presto-set Glue at fifty cents is all right. Four one and a quarter pounds of Seal Rite Calking Compound at sixty cents which would be correct. One Calk and Tube, that's undoubtedly a set, a gun and a calking tube at six sixty, that would be all right. One Tile Fix at twenty cents, that would be right. Two

(Deposition of Paul Henning.)

Seal Rite Caulking Guns, tube, at six sixty which would be right for the heavy gun. Four guns at two dollars which would be all right, that would be correct. Six Putty knives at thirty cents, that would be correct. Two Number Six thousand three X brushes at two dollars. I am not familiar with that number of brush, but two dollars, if it was a four inch brush, that would be correct, and the next item is a scraper at ninety cents, would be all [301] right. Three scrapers again at forty cents would be all right. Five one inch scrapers at sixty cents is all right. Two paste spreaders, eight inch paste spreaders at sixty cents is all right. Four pounds of Durbens Water Putty, two dollars is right. One Yale lock and keys at fifty five cents would be all right. One wire brush, fifty cents is all right. One Chrome recess soap and grab at two dollars is all right. One spreader trowl at fifty cents, I don't know what type that is, but that sounds all right. One bag of perfatape at one dollar, that's probably worth about two and a half there. Two six by eighteen screens foundation vents at one dollar, that could be right. Twelve paint brush cleaners at ten cents is all right. Four one-half inch Schlage lock sets, AL-2, six eighty, that would be all right. That would be all right if it was a key lock, it doesn't say, but I imagine it is. One door latch set with knobs, two sixty is about right. One front door lock, twelve fifty, would be correct. One set of four inch half surface Butts-Stanley at fifty cents is all right. Four dozen pack-

(Deposition of Paul Henning.)

ages of Butts, fifty cents, it doesn't say what size, but if they were the standard door butts it would be correct. Five dozen packs of dull brass butts at fifty cents is all right. Four cans of Kerpo spray paint, eighty cents is right. One set of three inch [302] half surface butts at fifty cents is right. Four sets of door locks at three sixty, it doesn't say what type, but that's an average price.

"Mr. Hilger: What is an average price?

"A. Three sixty per lock. Eleven quarts of glass frosting at twenty cents is correct. One pint of Shellacol at forty cents is correct; one eight ounce weldwood glue at sixty cents is correct. One quart of putty at sixty cents is all right. Three one and three-quarter ounce Miracle adhesive at twenty cents. Nineteen half-pint Seal-Rite Glazing Compound at twenty cents is right. Two half-pints of Seal Rite putty at twenty cents is all right. The next item is a Fuller item which didn't come from us. Three gallons of Pabco Raintite fibre roof coating at one dollar is correct. Four pair of McKinney hinges at sixty cents is correct. Five drawer knobs at twenty cents is correct. Five pair of hinges at eighty cents is all right. Five pair of knobs at twenty cents is all right. Two pair of hinges at eighty cents is all right. Six pair of hinges at eighty cents is all right. Six cabinet latches at forty cents, that's correct. Six pair of cabinet latches at forty is right. Two pair of drawer pulls, twenty cents is right. Six pair of strap hinges, eighty cents is all right. Six pair of

(Deposition of Paul Henning.)

strap hinges at eighty cents is all right. [303]
Six pair of strap hinges at eighty cents is right.
Six pair of strap hinges at eighty cents is right.
Three pints of Jasco Paint Remover at seventy-five is correct. One gallon of Super Kem-Tone wall paint at three sixty is correct. One gallon of Pabco seven seven two tint base satin enamel is correct. One pint of Pabco base at a dollar ten is correct.

“Q. Those are all items on page four supplied or handled by your firm? A. Correct.

“Q. Now referring to page five, would you likewise run down that page and tell us what items you would deal in or supply and what the reasonable value is and price thereof would be on June of 1956?

“A. Right. The first one, a quart of Pabco tint base house paint at a dollar ten is all right. One quart of the same at a dollar ten is right. One gallon of exterior gloss white at five ten would be correct. The next item isn't ours. The next one is one set of Schlage lock set at four twenty which is approximately right. One roll of Pabco wall. I don't know what they have it priced here, a roll of Pabco wall is about forty dollars which is what they have extended, one and a third rolls of the same thing they have ten dollars which should be probably around sixty dollars for one and a third rolls. [304]

“Mr. Castro: Well, isn't it one-third roll?

“A. Is it one-third of a roll? That would be correct if that is what it is, yes. Two brooms,

(Deposition of Paul Henning.)

those aren't ours. Twelve bundles Pabco thick tab shingles, those are worth eight dollars and fifty cents for three bundles, eight dollars and fifty cents, that would be approximately right.

"Mr. Hilger: What would be approximately right?

"A. Thirty three dollars. One roll of Pabco black roofing at three twenty is correct. One pull—one drawer pull display board at two sixty, that should be around twelve dollars.

"Q. What is it now?

"A. It's a drawer pull display board.

"Q. What's it listed there?

"A. Two sixty.

"Q. What should it be?

"A. It should be around twelve to fifteen dollars. I am not sure which one it was, but they're all in the same price range.

"Q. I see. Go on.

"A. One hinge and latch display board at seven sixty. That would be correct. Two hundred and fifty foundation bolts at fifteen cents would be correct. Two spools of foundation wire at two dollars, that item [305] there is around nine dollars per roll.

"Q. What is it listed there at?

"A. It's listed at two dollars, it should be around seventeen dollars, I'd say, for the two rolls.

"Q. Instead of what?

"A. Instead of two dollars which they have.

"Q. All right. Go on.

(Deposition of Paul Henning.)

"A. One padlock, Yale. I believe that says fifty five dollars. That wouldn't be one Yale padlock. I don't know what that would be. If it was a Yale padlock it would probably be around one dollar.

"Q. All right. Go on.

"A. Two sets of planer heads. Those aren't ours. The next item copper tubing is not ours. Three kegs of wire nails, approximately four hundred pounds, sixty four dollars, that would be correct. Four lock sets on display at four sixty, that would be correct. Twenty one gallons of Pabco roof coating at a dollar ten would be approximately right. The next item, the Porter Cable saw is not ours. The Firestone wheelbarrow tires and wheels aren't ours. Six four by eight sheets of masonite damaged, well, when we sold it it wasn't damaged.

"Mr. Castro: How do you know it's the same masonite?

"A. Well, not being damaged, I wouldn't know.

"Mr. Hilger: What would be the value of the [306] undamaged masonite?

"A. Undamaged masonite would be approximately two dollars per sheet.

"Q. And what is it?

"A. They have five dollars per sheet or thirty dollars. That possibly wouldn't be ours. It may be tile board or something of that sort, I am not sure. The next item is window casings, aren't ours; seventeen cans of lap cement at twenty cents

(Deposition of Paul Henning.)

is correct. Eight gallons of hydroseal at six dollars would be correct. The next item is not ours. The next one is not. The next one, no. The next one, no. Here's four and a half boxes of linoleum tile, fifty four dollars, that would be correct. Two gallons of Kem-tone at three sixty is correct. One gallon of Kem-glo at four sixty would be correct. One rubber tired wheelbarrow at fifteen dollars would be correct. Seventeen pint cans—no, seventeen bundles of burned Pabco shingles at forty nine fifty. Again, that's six times four, that would be correct. One five-foot step ladder at two fifty, that's correct. Two bags of joint cement at two fifty, that would be all right, two fifty per bag, those are worth five dollars. They have them down as two fifty for both bags.

“Q. Now then those are all of the items on page four [307] of the exhibit, rather, on page five of the exhibit, of Exhibit A that your firm might have supplied or deals in? A. That's correct.

“Q. Now then referring to the page following five which is unnumbered and which is marked exhibit B attached to Exhibit A, was there any of the items on there in which your firm deals or which you would have supplied?

“A. Yes, the plywood, we would supply that.

“Q. What would be the value of the plywood shown on Exhibit B, the fair market value on June 26th, 1956?

“A. Well, they have it at fifteen cents per square foot. It varies according to the thickness

(Deposition of Paul Henning.)

of the plywood. That would be approximately the price of half inch plywood.

“Q. What would be the price of quarter and three-eighths and five-eighths and seven-eighths and so forth?

“A. I would say it varied from a quarter inch which would run nine cents per square foot to three-quarter inch which would run twenty two cents per square foot. The next item of roofing material, asphaltic, two hundred squares, that would be thick tab shingles at eight twenty which would be a fair price there.

“Q. That’s eight dollars and twenty cents per square?

“A. Per square, correct. And that’s all on that page.

“Q. Now in response to our request you have produced [308] here invoices covering the recorded sales to Eureka Lumber Company by Rice Supply for the first six months of 1956?

“A. That’s correct.”

Mr. Castro: May I read a few lines of the cross examination?

The Court: Very well.

“By Mr. Castro:

“Q. At the time of the fire, June 25th, 1956, was there an outstanding balance between Eureka Lumber Company and Rice Supply?”

Mr. Hilger: I object to that as incompetent, irrelevant and immaterial.

The Court: I do not think it is particularly

(Deposition of Paul Henning.)

material. I do not see that it does any harm. I will overrule the objection.

"The Witness: The balance that they owed us?

"Q. Yes. A. After June?

"Q. On June 25th, 1956?

"A. On June 25th approximately thirteen hundred dollars.

"Q. Did you visit the premises after the fire?

"A. Yes, I did.

"Q. And did you pick up any material there after the [309] fire? A. No, sir.

"Q. Did you have any material picked up there after the fire? A. No, sir.

"Q. Were twelve doors picked up by the Rice Supply Company after the fire?

"A. That was picked up by me, personally.

"Q. Well, then you picked something up?

"A. That was myself, yes, not the company.

"Q. And did you pay for the doors?

"A. No, I did not.

"Q. What did you do with the doors?

"A. I used them in my house, my personal house.

"Q. Is it a home that you were building?

"A. Yes.

"Q. Did you have to do anything to the doors in order to use them at your home?

"A. Yes, I had to sand them down, they were burned.

"Q. Did you do anything else with them?

"A. No, sir.

(Deposition of Paul Henning.)

“Q. Did you remove anything else from there?

“A. At the same time there was twelve jambs, doorjambs.

“Q. And did you use those? [310]

“A. Yes.

“Q. Did you pay for them? A. No, sir.

“Q. Is there anything else that you removed?

“A. No, that's all.

“Q. Did you sell any reject plywood to Eureka Lumber Company?

“A. At any time, you mean?

“Q. Yes. A. Yes, uh huh.

“Q. How much reject plywood did you sell to Eureka Lumber Company?

“A. Oh, I wouldn't be able to answer that without checking through the records.”

Mr. Castro: Page 18.

Mr. Hilger: Would counsel object to the reading of Page 17?

Mr. Castro: This is continuity that goes with what I had.

“Q. Did you have permission from somebody to remove those items?

“A. Yes, from Mr. Jensen.

“Q. Which Mr. Jensen? A. H. M.”

Mr. Hilger: I would like to read portions of [311] Page 17 of the cross examination beginning at line 6 on Page 17:

(Mr. Hilger reading.)

“Q. Do you know whether these items you have

(Deposition of Paul Henning.)

referred to in the proof of loss as to whether those items were involved in the fire of June 25th, 1956?

"A. I missed the first part of that.

"Q. Do you know whether the items that you referred to in the proof of loss were involved in the fire of June, 1956?

"A. Do I know that they were?

"Q. Yes.

"A. There was some of them after I visited the fire that you could see there had been burned like the shingles and the paint and what not in there.

"Q. The shingles hadn't been burned?

"A. Yes.

"Q. Hadn't been burned?

"A. They had been burned, yes.

"Q. The paint was burned?

"A. The paint was burned, uh huh.

"Q. Any other items you saw there?

"A. Oh, practically everything I saw was burned.

"Q. Well, do you know whether each of those items you referred to in your direct testimony were on the property at the time of the fire? [312]

"A. I would say most of them were, yes.

"Q. Did you see them there?

"A. Yes, uh huh."

Mr. Hilger: I would like to read into evidence at this time the deposition of Haley J. Bertain, likewise taken in Eureka, California, on September 19, 1957.

"HALEY J. BERTAIN

"a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

"Direct Examination

"Q. (By Mr. Hilger): Would you state your name, please? A. Haley J. Bertain.

"Q. Where do you reside, Mr. Bertain?

"A. 1963 Myrtle Avenue in Eureka.

"Q. What is your business or occupation?

"A. Douglas fir sales manager for Simpson Redwood Company.

"Q. Where do you have your office?

"A. At Second and M Street in Eureka.

"Q. Did you formerly work for a company that was purchased by Simpson Redwood Lumber Company?

"A. Yes, I did. I worked for Eureka Redwood Lumber Company, and that was purchased by Simpson Redwood Company last August. [313]

"Q. It would be August of 1956?

"A. August, 1956.

"Q. How long had you been with the Eureka Redwood Lumber Company?

"A. Since it originated. Actually, I was at the plant, you see, since 1945. This plant that is in question now originally was Dolbeer and Carson and then was Pacific Lumber Company and then—I have worked at the same plant since 19—I think it was 1946 at the Dolbeer and Carson plant and it was purchased by the Pacific Lumber Company in 1951 and then purchased by M & M in 1952,

(Deposition of Haley J. Bertain.)

if my memory is correct, and known at that time as the Eureka Redwood Company, and then, of course, it's now owned and operated by Simpson Redwood Company.

“Q. Since Simpson took over the operation of your main production out of your plant there where you have been working, is it Douglas fir or redwood?

“A. Up until Simpson purchased the plant we were one hundred per cent redwood operation at which time I was the plant manager and Simpson converted us to a Douglas fir operation, one hundred per cent Douglas fir at the present time.

“Q. In connection with your work have you had occasion to know the Eureka Lumber Company and Hyrum [314] Jensen?

“A. Yes, I know Mr. Jensen personally and we have done business directly through me in purchases for his company.

“Q. Would that cover the period through 1954, '5 and '6? A. Yes, sir.

“Q. In your capacity and occupation in the lumber business are you familiar with what type of stock would be suitable for the manufacture of molding? A. Yes, I am.

“Q. Did you sell or did your company sell such type stock to Hyrum Jensen or the Eureka Lumber Company during the period that you have mentioned?

“A. Yes, we did.

(Deposition of Haley J. Bertain.)

“Q. Have you any records or other data concerning those sales, Mr. Bertain?

“A. We have records that I could—that I located in our files, sales that we had made to them through August, 1955, through September, 1956, the total sales at that time.

“Mr. Castro: Just a moment. May I see what you have there? May I see what you have?

“A. Uh huh.

“Mr. Hilger: Do you have the records themselves or [315] a summary of the purchase data that you have taken from them?

“A. We have the records on file, the invoices, of these particular sales here.

“Q. You have made a summary of those?

“A. This is a summary here of what is on the files.

“Mr. Castro: May I ask him a question or two? You prepared that record that you have just handed me?

“A. Yes.

“Q. When did you prepare it?

“A. It was prepared from our records in San Francisco.

“Q. When?

“A. Phoned to me this morning.

“Q. When? A. This morning.

“Mr. Castro: Same objection, Counsel.

“Mr. Hilger: You do not have your invoices in the Eureka office?

“A. No. These—the invoices that are pertain-

(Deposition of Haley J. Bertain.)

ing to this summary here, they're in our files, in our San Francisco sales office.

“Q. Now then this memorandum that we have here, the first date shown upon it relating to any item whatever it may be is August the 6th, 1955. Did your company [316] make any sales to the Eureka Lumber Company of stock suitable for manufacture into molding prior to August 6th, 1955?

“A. Yes. Those records are not easily available because they were cash sales prior to these particular——

“Q. (Int'g.) Have you made an effort to locate those records in the files of your company?

“A. Yes, we have. However, the company has been broken up and we are having a little difficulty reaching the records at the present time due to the peculiar way that—I am not too familiar with the maintaining of cash sales records.

“Q. Were you able to locate those records after your search, in the course of your search?

“Mr. Castro: Those are records prior to August of '55 you are asking about?

“Mr. Hilger: Yes.

“The Witness: Yes.

“Mr. Hilger: Have you been able to locate those records, Mr. Bertain?

“A. Up to this point, no.

“Q. Do you have any personal recollection of the transactions prior to August the 6th, 1955, with the Eureka Lumber Company? A. Yes. [317]

(Deposition of Haley J. Bertain.)

“Q. Prior to that date did you sell any stock to them suitable for manufacturing into moldings?

“A. Yes.

“Q. Do you recall the approximate amount or footage of such sales?

“Mr. Castro: Prior to what date?

“Mr. Hilger: Prior to August 6th, 1955.

“The Witness: I could only from my recollection, I would say that it would be a minimum amount of fifty thousand feet of kiln-dried molding type stock, that's what we call molding stock, stock that could be remanufactured for molding items.

“Q. Now, then, you have referred to the face that prior to August 6th, 1955, your records would reveal sales of this type of material and other items to the Eureka Lumber Company, is that correct?

“A. Yes, they should.

“Q. Did they continue to buy for cash after August the 6th, 1955?

“A. To the best of my knowledge, they did not buy for cash after August of '55.

“Q. In what manner did they make their purchases?

“A. Through a wholesaler by the name of Hill & Morton.

“Q. I see. Now do you have a recollection of the [318] amount of materials that they purchased in that manner after August, 1955 and up to June of 1956?

“A. Yes, that's what this summary would be.

“Q. Do you have a recollection of that footage?

(Deposition of Haley J. Bertain.)

“A. Unfortunately, I don’t. I would have to look at this sheet at the present time.

“Q. Well, you prepared that sheet this morning, I think you stated.

“A. I took the memo and I read it off, but I can’t visualize it in my mind right now, unfortunately.

“Q. Would the use of that memorandum which you have prepared refresh your recollection of transactions since August the 6th of 1955?

“A. Oh, yes. Unfortunately I have prepared many other reports.

“Q. And what transactions or what footage, I am sorry, what footage of material suitable for remanufacturing into molding was sold by your firm, the Eureka Lumber Company—by your firm to the Eureka Lumber Company after August the 6th, 1955, and before June the 25th, ’56? Does the use of this memorandum refresh your recollection of the transactions with the Eureka Lumber Company during the period covered in the memorandum? A. Yes, they do. [319]

“Q. All right. Now what is your recollection then, Mr. Bertain, of the sales made by your firm to the Eureka Lumber Company of molding type stock during the period August of ’55 to June 25th of 1956?

“A. Well, on the basis of the summary here twenty thousand feet of the factory cuts as described here are items that would be used for remanufacturing and reworking into molding items.

(Deposition of Haley J. Bertain.)

That would be the logical thing to do with them in a remanufacturing plant.

“Q. Does that include the last item?

“A. That doesn’t include the last item because even though my recollection would be that—without this summary—that there would have been more footage than that purchased, the last item, of course, doesn’t come within the dates here that you mentioned.

“Q. What is the date of that last item?

“A. The last item on this summary reads nine—September 13th, 1955, but in my recollection at the present I believe that should have been September of ’56, so I really think it’s an error in typing.

“Q. Your best recollection, then, is that it would be during this period of eight six fifty five to June 25th, ’56, then would be in the neighborhood of twenty thousand?

“A. I would say a minimum of twenty thousand. My [320] recollection, as I mentioned before, I would say this is a minimum amount, as I was under the impression without this summary that there was possibly more than this purchased. However, this—I’ll have to use this as a basis. My recollection could be due to the periods involved, the larger volume, according to my recollection of that type of material, could have been purchased just prior to this record that we have here. I know that it was, I can’t say what period it was. In my mind it is—see, because the story in our dealings basically with the Eureka Lumber Company—

(Deposition of Haley J. Bertain.)

“Mr. Castro: (Int’g.) Been no question asked of the witness.

“Mr. Hilger: Mr. Bertain, in the course of your experience in the redwood industry prior to and up to June of 1956, did you become familiar with the market values of redwood lumber and redwood products in the Humboldt area?

“A. Yes.

“Q. And on June—in June of 1956 what would be the fair market value of redwood moldings and window casings in the Humboldt area?

“A. Well, of course, there’s a wide range of molding values even now, and in terms of per thousand board measure I would believe that the lowest molding items [321] would start from two hundred dollars and go up to as high as four hundred dollars per thousand board measure.

“Q. Would an evaluation of redwood molding and window casings at two hundred and twenty dollars per thousand board feet, board measure, be a reasonable evaluation in June of 1956 in Humboldt County?

“A. To the best of my knowledge and ability, it would be very conservative.

“Mr. Hilger: That’s all.

“Cross Examination

“Q. (By Mr. Castro): When were you first contacted to be a witness here, Mr. Bertain?”

Mr. Hilger: We will stand upon the objection.

The Court: I will allow it.

(Deposition of Haley J. Bertain.)

“The Witness: I’ll have to say about two weeks. I am just not sure of the date.

“Q. How were you contacted, in writing or orally? A. Orally.

“Q. And who contacted you?

“A. Mr. Hilger.

“Q. And were you requested to bring with you any invoices?

“A. Yes, if I had them available I was asked to.

“Q. And did you make a request of your employer to produce the invoices? [322]

“A. I asked for the information that I have here now, yes.

“Q. When did you ask for that information?

“A. I asked for that about—well, the day after Mr. Hilger asked me if I could provide him with this type of information.

“Q. And when did you receive this?

“A. I received it over the telephone this morning from our San Francisco office. The delay was due to our accounting procedure as this wasn’t under Eureka Lumber Company’s name, it was under the name of a wholesaler. That caused some delay, you know, in arriving—and finding it.

“Q. Whose name?

“A. These sales were invoiced by our company to Hill & Morton Lumber Company.

“Q. You haven’t seen those invoices?

“A. I haven’t seen these. I probably prepared a number of them myself at the time.

“Q. What does the phrase ‘factory cuts’ mean?

(Deposition of Haley J. Bertain.)

“A. It’s a reject kiln-dried upper grade due to mismanufacture or characteristics that would not allow it to be graded into the regular standard specifications, set aside for the purpose of remanufacturing and are sold at a lower value than other associated grades. [323]

“Q. Then this lumber had been rejected by your company, the Eureka Redwood Company?

“A. Yes.

“Q. Now do you know whether this lumber that is listed, this twenty thousand feet that you referred to, whether that was at the Eureka Lumber Company at the time of the fire in June 25th, 1956?

“A. I can only assume.

“Q. Were you there?

“A. That it was.

“Q. Do you know?

“A. It was shipped to them prior to their fire. I don’t know by knowledge that it was actually there, no.

“Q. You don’t know what portion of it had been sold?

“A. I have no knowledge as to what could have been sold of it prior to the fire, no.

“Q. What was the charge per thousand when you sold this lumber?

“A. To the best of my recollection the majority of it was sold at twenty dollars per thousand.

“Q. Twenty dollars per thousand. And is that the going price for these rejects?

(Deposition of Haley J. Bertain.)

"A. As far as we were concerned, it was at the time, yes.

"Q. Now when you gave the price of two hundred to [324] four hundred dollars per thousand board feet on redwood moldings were you thinking of rejects? A. No, finished moldings.

"Q. Apparently there is quite a difference between the rejects and the finished piece of molding?

"A. There is. The rejects to us were of no value because we were incapable of manufacturing them in our operation, and we had not the facility nor the time and labor to remanufacture that particular type of stock.

"Q. Do you know whether any of these rejects were manufactured by the Eureka Lumber Company?

"A. I have no way of knowing for sure whether they were all remanufactured by them. I know that some were and I——

"Q. (Int'g.) When were you there the last time before the fire?

"A. I can't recall ever being inside their plant.

"Q. Did you ever see any of this reject lumber that you sold there in a manufactured state?

"A. No.

"Redirect Examination

"Q. (By Mr. Hilger): You have referred to the fact that the items covered in this memorandum were invoiced to Hill & Morton. Do you know whether the stock called for reflected on it—on

(Deposition of Haley J. Bertain.)

them was delivered, or to whom, [325] I should say?

“A. It was consigned from our plant in the case of kiln-dried factory cuts or factory remanufacture stock to their plant in Eureka.

“Q. The Eureka Lumber Company?

“A. The Eureka Lumber Company’s plant, their own operation. The items that I didn’t refer to there as being remanufacture stock was delivered directly to customers, their customers from our plant.

“Mr. Castro: Whose customers?

“The Witness: The Eureka Lumber Company’s customers.

“Mr. Hilger: That would not apply to the factory remanufacture stock?

“A. No, the remanufacture stock was consigned from our plant to their plant.

“Q. When you say ‘their plant’ you mean Eureka Lumber Company plant?

“A. I mean the Eureka Lumber Company, yes.”

Mr. Castro: I believe that is all I had, your Honor.

Mr. Hilger: I would like to complete the redirect examination, your Honor, beginning at page 15, line 7:

“Q. (By Mr. Hilger): Now it has been referred to here that this stock is reject stock. What is the reason for its reject, dimensions or poor quality of lumber involved? [326]

“A. Reject was used in describing it as not fit-

(Deposition of Haley J. Bertain.)

ting the standard grade segregation that we have available to offer from our plant. It did not apply itself to any standard item that we produced.

“Q. Was that because of the sizes or because of the dimensions? “A. The reason——

“Q. (Int’g.) I am sorry, sizes and dimensions are two similar words, was it because of the size and dimension or because of the quality of the lumber contained in the piece?

“A. It would be due to both causes in cases of mismanufacture due to error or due to scantness of stock and skipping and not finishing up to the standards of standard grades or due to characteristics such as knots or splits or other defects in lumber that make it unsuitable for high class finishing in its original dimensions. It would be instead of—in our case, like I mentioned, not able to remanufacture it due to the high cost and lack of facilities at our plant, and this type of stock is all thrown in a pile and called reject because it doesn’t fit into a standard item at that time.

“Q. When remanufactured into molding does that mean the molding is reject or low quality molding? [327]

“A. This reject stock that we are talking about now, we actually remanufacture some of it, but we were unable to remanufacture all of it and keep it cleaned up as fast as it developed, and that’s why Mr. Jensen’s operation was used basically to sweep the floor and when we couldn’t keep up with it it was to our advantage to sell it to him at twenty

(Deposition of Haley J. Bertain.)

dollars, and, at times, I believe up to fifty dollars a thousand to move it out of our way.

“Q. Now we can get this question answered. Mr. Bertain, would the moldings that would be manufactured out of this material be standard quality moldings or would they necessarily be reject molding items?

“A. No, the moldings would be standard molding items.

“Mr. Castro: That depends on the manufacturer.

“The Witness: It depends on the manufacturer, certainly.

“Mr. Hilger: What I am getting at, Mr. Bertain, is the fact that you had rejected it for your purposes would not necessarily make it unsuitable for the manufacture of standard quality moldings?

“A. No, definitely not.

“Q. And is this the type of material that is ordinarily used for these moldings and other remanufacturing processes such as took place down at the Eureka Lumber Company? [328]

“A. Yes, it is normal stock used for moldings.

“Q. And for the production of standard quality moldings?

“A. For the production of standard quality moldings, yes.”

Mr. Castro: Mr. Hilger, this is the sheet we gave to Mr. Stearns at the time to pick up the other invoices. Do you object to the use of that?

Mr. Hilger: Absolutely there is an objection. I objected to it at the time and I object to it now.

Mr. Castro: Your Honor, I offer in evidence the sheet which the witness Bertain was reading from at the time of this deposition, designating what was factory cut and what was sent to other customers.

Mr. Hilger: There is no foundation for it.

Mr. Castro: The typewritten portion of that sheet is the portion which Mr. Bertain had. He gave it to Mr. Russell Stearns, an accountant, at the deposition, and Mr. Stearns had made those notations in pencil.

The Court: You can mark it for identification. Without some further foundation for it, it is not admissible. It does not appear who wrote what on here. There are changes in pencil.

Mr. Castro: I am offering it for the typewritten portions, Your Honor. [329]

The Court: There are certain of the typewritten portions that are changed. I think you have to lay a better foundation if you want it.

Mr. Castro: May it be marked for identification at this time?

The Court: It may be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit M for identification.)

Mr. Hilger: At this time we would read into evidence a portion of the deposition of Harold Dee Jensen, previously referred to herein, beginning at page 54, reading down through line 11 on page 55.

HAROLD DEE JENSEN

called as a witness by the defendant and third party plaintiff, Boston Insurance Company, being first duly sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

“Q. (By Mr. Castro): The proof of loss that you are now looking at, Mr. Jensen, has a five-page inventory attached to it. (That is the same proof of loss that is now in by photostat copy as Plaintiff’s No. 5.) That was the inventory which you furnished to Mr. Hilger?

“A. I was just with Gene Cox—Gene Fox, it is—and he took the inventory and I just assisted him, [330] identifying some of the objects. He is the C.P.A. that took the inventory.

“Q. And did you discuss with him the prices which were placed on the items there in Exhibit A in that proof of loss?

“A. Yes. We got them out of price books and invoices.

“Q. Which is the proof of loss under Policy No. 560594. With reference to Exhibit B attached to that proof of loss, it refers to completely destroyed inventory, entirely consumed by fire. Did you determine that portion of the inventory?

“A. Yes.

“Q. And how did you make the determination of that inventory amounting to \$20,600?

“A. By previous inventories.

“Q. What previous inventories are those?

“A. One that I had taken for sales.

(Deposition of Harold Dee Jensen.)

“Q. Did you have those prior inventories in writing?

“A. To a certain extent. They were jotted down on scratch paper.

“Q. And where is that scratch paper?

“A. I don’t know, probably burned.

“Q. This Exhibit B was made up after the fire, wasn’t it?

“A. That’s right. This was taken from memory. I [331] had everything for sale, and I knew how much was there for sale at the time.

“Q. You carried that in your mind?

“A. That’s right.

“Q. Now, down with Exhibit C, Inventory on Damage by Fire, did you make a physical inventory of the lumber described in Exhibit C?

“A. That’s right.

“Q. How did you fix the prices which were used to reach \$30,000?

“A. Just a wholesale market price, cost.

“Q. That is cost to Eureka Lumber?

“A. That’s right.

Mr. Castro: I have nothing to read at this time, Your Honor.

The Court: Very well.

Mr. Hilger: At this time we will read into evidence the deposition of Dayton Murray, Jr., taken in Eureka, California, on September 7, 1957. [332]

“DAYTON MURRAY, JR.

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Direct Examination

“Q. (By Mr. Hilger): This deposition is taken pursuant to stipulation. Will you state your name, please?

“A. Dayton Murray, Jr.

“Q. And where do you reside?

“A. Eureka, California.

“Q. What’s your profession or occupation?

“A. I’m an Attorney at Law.

“Q. Do you hold any office in Dayton Murray Truck Sales?

“A. I am presently the Secretary of that Corporation.

“Q. In connection with your duties do you have custody of the records and documents of Dayton Murray Truck Sales? “A. I do.

“Q. Are you familiar, at least in a general way, with the transactions of the Dayton Murray Truck Sales? “A. I believe I am, yes.

“Q. Are you familiar in particular with a transaction with the Eureka Lumber Company involving a sawmill? “A. Yes, I am.

“Q. Do you have in your possession any [333] records pertaining to that transaction?

“Mrs. Ragon: Should that letter be on plain paper? Should it be on your letterhead?

“Mr. Hilger: Plain paper.

(Deposition of Dayton Murray, Jr.)

"The Witness: I have two documents that pertain to that transaction. I have a corporation copy of the invoice and I have a bill of sale.

"Mr. Hilger: These are a part of the regular business records of Dayton Murray Truck Sales?

"A. Yes, they are. They were in the file marked under the name of Eureka Lumber Company when I received the same.

"Q. Do you have any personal knowledge of the transaction at all, have you ever discussed it with the officials of the company?

"A. I have no direct knowledge of the transaction. I have knowledge of it from discussions with Mr. Harold Dee Jensen and with Mr. Threlkeld who was the previous Manager of Dayton Murray Truck Sales.

"Q. And those discussions concerning this transaction were in the course of conduct of business of Dayton Murray Truck Sales?

"A. Yes, that's correct.

"Q. Now just what was that transaction, Mr. Murray?"

Mr. Castro: The following objection, [334] Your Honor, we would ask for the Court to rule on.

The following appears in the deposition and was read silently by the Court:

"Mr. Castro: (Inter'g) Object to the question on the grounds the witness has stated he has no personal knowledge on the subject matter. He has testified he has possession of two documents, and any other information he has is purely hearsay.

(Deposition of Dayton Murray, Jr.)

“Mr. Hilger: As a result of the discussions that you have had in the course of the conduct of business of Dayton Murray Truck Sales, state your knowledge of this situation.

“Mr. Castro: Object to it as incompetent, irrelevant and immaterial, calling for hearsay. The witness has testified he has no personal knowledge of the transaction.

“Mr. Hilger: Please answer the question.

“The Witness: From the examination of the records of the Dayton Murray Truck Sales——

“Mr. Castro: (Int’g) The question didn’t call for an examination of the records of Dayton Murray Truck Sales, it called for your knowledge based upon your discussions had in the course and conduct of business of Dayton Murray Truck Sales.

“The Witness: My knowledge based on my discussions of the——

“Mr. Castro: (Int’g) Same objection to it, same objection that has been previously made, hearsay and the witness has stated he has no personal knowledge of the transaction.

“The Witness: May I answer the question, Counsel?

“Mr. Hilger: Yes.” [334a]

The Court: I will overrule the objection.

Mr. Hilger: Thank you, Your Honor. I believe the question is finally answered on page 9. May I begin the reading there:

“A. My discussions with Mr. Harold Dee Jensen

(Deposition of Dayton Murray, Jr.)

and with Mr. Threlkeld who was the then Manager of the Dayton Murray Truck Sales at the time of this transaction and from the documents of Dayton Murray Truck Sales, Dayton Murray Truck Sales sold a nine seventy-four series Diesel truck to the Eureka Lumber Company on January 1, 1956, at least, that's the date of the invoice. As a down payment to Dayton Murray Truck Sales they took a two seventy-five Cummings Diesel engine in a portable sawmill and credited four thousand dollars on the purchase price of the truck and agreed with Eureka Lumber Company to give them an additional thirty-five hundred dollar credit upon the sale of this resale by Dayton Murray Truck Sales of this sawmill unit or upon a certain date which is set forth in the invoice, whichever first occurred. I believe it was approximately six months after the date of the transaction.

"Mr. Hilger: Now you have testified that in your official capacity you have custody of the records and documents of the Dayton Murray Truck Sales? [335] "A. That's correct.

"Q. Mr. Murray, I hand you a car invoice form number 205 bearing the heading Dayton Murray Truck Sales, bearing date of January first, 1956. Did that document come from the regular records and books of the Dayton Murray Truck Sales?

"A. Yes, it did.

"Q. Was that prepared in the ordinary course of business? "A. Yes, it was.

(Deposition of Dayton Murray, Jr.)

“Q. And were the—in the ordinary course of business were those prepared at or about the time of the transaction they purport to reflect?

“A. Yes.

“Q. They form a part of the records of Dayton Murray Truck Sales that are in your custody, in your official custody with the Dayton Murray Truck Sales?

“A. Yes, that's correct.

“Q. Now, then, I direct your attention to certain figures upon that form. Looking at the right most column there is a column of figures. What is the significance of those figures?

“A. Well, the top most figure is the sales price of the unit sold to Eureka Lumber Company by Dayton Murray Truck Sales, and then there's other figures for sales [336] tax, license and financing costs, leaving you the total price and further down there's a credit given.

“Q. A credit against that purchase price?

“A. That's correct.

“Q. According to this document it would appear that there was sold to Eureka Lumber Company a piece of equipment. Those figures that you have just referred to, would that refer to the equipment that was sold to Eureka Lumber Company?

“A. That's correct.

“Q. And it shows a total price figure of fourteen thousand eight hundred and forty-six dollars. That would be the price of the piece of equipment bought by Eureka Lumber Company?

(Deposition of Dayton Murray, Jr.)

“A. That’s correct, it was a used truck and trailer.

“Q. Now, then, directly underneath the fourteen thousand odd dollars figure there appears a credit of four thousand dollars. What does that represent, Mr. Murray?

“Yes, Pardon me. I’ll lay a little foundation. You have knowledge of the record of Dayton Murray Truck Sales and what the entries upon those records reflect? “A. Yes, I do.

“Q. What does that figure, that four thousand dollar figure represent.” [337]

Mr. Castro: I stand on the objection made at that time.

The following appears in the deposition and was read silently by the Court:

“Mr. Castro: I object on the grounds it’s irrelevant, incompetent and immaterial. The witness has already testified and my examination shows that he has no personal knowledge concerning this transaction, and the document is the best evidence of what it states, and the original of the document would constitute the best evidence.” [337a]

The Court: It is taking an awful long time to prove a simple transaction, the purchase of a truck. I will overrule the objection.

Mr. Hilger: I think we can skip all the voir dire, then, and get down to the answer to the question, which begins on page 16, line 2:

“A. The four thousand dollar figure reflects a

(Deposition of Dayton Murray, Jr.)

credit on the purchase price given to Eureka Lumber Company by Dayton Murray Truck Sales on the trade-in of this portable sawmill described in the document.

“Q. Now in the ordinary course of conduct of Dayton Murray Truck Sales business where is the original invoice sent?

“A. The original invoice would have undoubtedly been sent to the purchaser.

“Q. Is the original of that invoice that you have there marked Defendant’s A for identification, is the original of that document in the records of the Dayton Murray Truck Sales?

“A. No, it is not.

“Q. I have reference now, Mr. Murray, to the notation appearing on Defendant’s A for identification ‘additional credit due June 12th, 1956, to be paid to YMAC on this [338] account in the amount of thirty-five hundred dollars.’ What is YMAC?”

Mr. Castro: I withdraw the objection.

“The Witness: YMAC is Yellow Manufacturing Acceptance Corporation which is the finance corporation for General Motors truck dealers. They finance the sales of equipment. Contracts are assigned to YMAC by the dealer making the contract. The significance of the notation here is that that represents the——

“Mr. Castro: (Int’g) Just a moment. He asked you what the initials stood for.

(Deposition of Dayton Murray, Jr.)

“Mr. Hilger: I’ll at this time ask you the significance of that notation.”

Mr. Castro: I withdraw the objection.

“Mr. Hilger: Would you answer that?”

“The Witness: The significance of the statement on the invoice is the thirty-five hundred dollars listed is additional credit due YMAC, represents the balance of the credit on the purchase price that was given for the trade-in of the portable saw-mill.

“Q. That would be the purchase price paid by Dayton Murray Truck Sales for the portable saw-mill? “A. That’s correct.

“Q. To Eureka Lumber Company?

“A. That’s correct. [339]

“Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollars item that you previously testified concerning?”

Mr. Castro: I stand on that objection.

The following appears in the deposition and was read silently by the Court:

“Mr. Castro: Objected to as incompetent, irrelevant, and immaterial, no identification as to who made that notation that you are referring to. It’s not part of the original document, that’s obvious.

“The Witness: YMAC is Yellow Manufacturing Acceptance Corporation which is the finance corporation for General Motors truck dealers. They finance the sales of equipment. Contracts are assigned to YMAC by the dealer making the contract. The

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significance of the notation here is that that represents the——

“Mr. Castro: (Int’g) Just a moment. He asked you what the initials stood for.

“Mr. Hilger: I’ll at this time ask you the significance of that notation.

“Mr. Castro: Objected to as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and not for a fact.

“Mr. Hilger: Would you answer that?

“The Witness: The significance of the statement on the invoice is the thirty-five hundred dollars listed is additional credit due YMAC, represents the balance of the credit on the purchase price that was given for the trade-in of the portable saw-mill.

“Q. That would be the purchase price paid by Dayton Murray Truck Sales for the portable saw-mill? “A. That’s correct.

“Q. To Eureka Lumber Company?

“A. That’s correct.

“Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollar item that you previously testified concerning?

“Mr. Castro: Same objection.

“The Witness: That’s correct.

“Mr. Castro: Same objection to this line of questions, Counsel, he has no personal knowledge of the transaction.” [339a]

The Court: Overruled.

“Mr. Hilger: Then your answer is yes?

(Deposition of Dayton Murray, Jr.)

"The Witness: My answer is yes.

"Q. I'll show you now a bill of sale reflecting a transfer from Eureka Lumber Company to Dayton Murray Truck Sales of a portable sawmill. Is that document a part of the records of Dayton Murray Truck Sales in your official duties, in your official capacity with Dayton Murray Truck Sales?

"A. Yes, it is.

"Q. Did that document to which you're now referring, the bill of sale, come into your possession at the same time that Defendant's A for identification was given to you?

"A. Yes, it did.

"Q. That would have been in February or early March of 1956?

"A. That's correct.

"Q. Do you know whether or not that covers the same piece of equipment reflected on the notation on Defendant's Exhibit A, portable sawmill, two seventy-five [340] Cummings Diesel engine?

"A. I believe it does."

Mr. Hilger: At this time I will offer both the bill of sale and the invoice into evidence as Plaintiff's next in order.

The Court: There are documents that are attached here.

Mr. Hilger: Yes, Your Honor.

Mr. Castro: I object to the invoice on the ground it is not the best evidence of the transaction, Your Honor.

The Court: You are making an objection to the document?

(Deposition of Dayton Murray, Jr.)

Mr. Castro: Yes, the copy which was used of the invoice.

The Court: I will overrule the objection. You want them marked one exhibit?

Mr. Hilger: They may be marked as one exhibit.

(The bill of sale and the invoice were thereupon received in evidence and marked Plaintiff's Exhibit 20.)

Mr. Hilger: I think that is all the Plaintiff wishes to introduce from this deposition.

Mr. Castro: This is referring to page 12, line 18. Exhibit A is the invoice, I believe.

"Mr. Castro: When did you first see Exhibit A?

"A. Probably in the—I am speaking from memory only, in the latter part of February or the early part of March of 1956.

"Q. And where did you see it?

"A. In my office.

"Q. Where is your office located?

"A. 550 I Street, Eureka, California.

"Q. Is that the office of the Dayton Murray Truck Sales?

"A. No, it is not. It's the office of my firm, Huber and Goodwin.

"Q. That's where you practice as an attorney?

"A. That's correct.

"Q. As an attorney at law?

"A. That's correct, sir.

"Q. And did you receive that document in the

(Deposition of Dayton Murray, Jr.)

course of the mail or did someone deliver it to you personally, in person?

“A. My father, who is the President of Dayton Murray Truck Sales, delivered it to me with the additional other documents relating to the business of Dayton Murray Truck Sales.

“Q. What other documents do you have reference to?

“A. The entire corporate records of that corporation.

“Q. When did you become Secretary of the corporation? [342]

“A. I was originally Secretary and when the corporation was formed in 1950, I believe it was, and I became Secretary again about the same time I received these documents.

“Q. Was an interim between 1950 and February of 1956 when you were not a Secretary of the corporation?

“A. The interim period would run from September of 1953 at which time my father and myself sold our stock in the corporation until 1956, the date I have been referring to.

“Q. Can you be a little more specific as to the date?

“A. The best I can give you is the latter part of February or the early part of March of 1956.

“Q. And you had a certain portion of the capital stock of Dayton Murray Truck Sales up to September of 1953? “A. That’s correct.

(Deposition of Dayton Murray, Jr.)

“Q. And your father had a certain portion of the capital stock of the corporation?

“A. That’s correct.

“Q. Were there any other stockholders?

“A. No, sir.

“Q. Then you disposed, you and your father both disposed of your capital stock in the corporation? “A. That’s correct. [343]

“Q. And to whom did you dispose of it?

“A. To Mr. W. A. Threlkeld, who I have previously referred to as then Manager of the Dayton Murray Truck Sales.

“Q. And thereafter did you have anything to do with the management of Dayton Murray Truck Sales?

“A. I would say no other than general advice from time to time.

“Q. By ‘general advice,’ are you referring to being employed as counsel from time to time?

“A. Yes, sir.

“Q. Or are you speaking of being a corporate officer?

“A. No, I was not a corporate officer from September of ’53 until February or March of ’56.

“Q. And on the date of Exhibit A you were not in any way connected with the Dayton Murray Truck Sales? “A. Not as an officer, no.

“Q. Were you employed by Dayton Murray Truck Sales as of January 1, 1956?

“A. Counsel, in answer to your question, you

(Deposition of Dayton Murray, Jr.)

say in any way connected, they owed me some money at the time, that's about the only connection I had.

"Q. You understand the term I am using connection as an employee of Dayton Murray Truck Sales?

"A. I am not an employee—I was not an [344] employee of Dayton Murray Truck Sales at the date of the invoice.

"Q. Do you know where the original of this invoice is, of Exhibit A is?

"A. It is probably in the files.

"Q. Do you know?

"A. No, I do not know of my own knowledge."

Then at page 23, line 20, of the cross-examination.

"Q. Do you have a ledger record which would reflect this transaction of the purchase of the GMC Utility truck and trailer with YMAC?

"A. I believe there would be a record with YMAC, but I think that the record of the transaction is contained in the invoice with a copy being sent to YMAC. In other words, the ledger record that you are referring to, if I am thinking about the same thing, would be a debit credit arrangement which usually is only kept regarding open accounts. Contracts are kept in separate files.

"Q. You don't have any ledger account set up with YMAC? "A. On this transaction?

"Q. On this transaction.

"A. Well, there's an account with YMAC on

(Deposition of Dayton Murray, Jr.)

the transaction, yes, and it will be reflected as reflected on the invoice.

“Q. And do you have possession or control of that [345] ledger record?

“A. I don’t believe I have that, no. Undoubtedly, YMAC has that record.

“Q. Where is YMAC located?

“A. It’s in Oakland, California for this district. Their main office is in Oakland, California, for this district.

“Q. Now do you know who’s had possession of this truck at the time of the fire of June, 1956?

“A. Eureka Lumber Company, the best of my knowledge.

“Q. And do you know who has possession of the truck at this time?

“A. I have no knowledge regarding that.

“Q. The invoice calls for certain payments to be made. Were those payments made?

“A. I don’t know.

“Q. Was Eureka Lumber Company delinquent in any of these payments at the time of the fire in June of 1956?

“A. I don’t know that either. At that time I was not connected with Dayton Murray Truck Sales or had anything to do with the operation.

“Q. But you do have a ledger account which would reflect the status of that account?

“A. That information could be obtained, yes, sir.

“Q. Could you obtain that ledger account [346] this morning?

(Deposition of Dayton Murray, Jr.)

“A. No, sir. I can explain that. The account is in my father’s place of business and he is out of town and will not return until tomorrow or Monday. I can’t get into the place.

“Q. Could you deliver a copy of that account to Mr. *Crnich*?

“A. Probably the first of the week I could.

“Q. Would you do that Tuesday or Wednesday or this coming week?

“A. You want any ledger account showing debits and credits between the Eureka Lumber Company and Dayton Murray Truck Sales?

“Q. That’s correct, with particular reference to this transaction if there’s a special account on it.

“A. I’ll deliver whatever we have in our possession on Tuesday.”

Mr. Castro: Is the ledger sheet in the original of the deposition that you have, Your Honor?

The Court: I handed all the papers attached to this deposition to the Clerk. You might look at it.

Mr. Castro: Yes, we would offer that in evidence as a defendant’s exhibit.

The Court: It has already been offered in evidence.

Mr. Hilger: I did not intend to offer any [347] ledger sheets into evidence, and I would like a moment to study it. I did not even know it was in the deposition.

The Court: There is a bill of sale and the invoice.

Mr. Hilger: I will object to that. Obviously on

its face it has nothing to do with the purchase and the sale of this piece of equipment. It is an open account, debits and credits, obviously for repair work done and credits given for payments thereon back and forth, showing the balance, but it has nothing to do with the terms of the invoice, and Mr. Murray's own testimony would be that the truck item would not appear in the ledger account but only in the open account.

The Court: Yes, there is a letter that accompanies it from the witness Murray. It says it is a balance due on open account.

Mr. Castro: May we ask that it be attached as an exhibit for identification?

The Court: So the record may be clear, Plaintiff's Exhibit 20 will be just the bill of sale and the invoice which is attached. Now, you want these other two documents, the copy of the ledger sheet and the letter of the witness to the Court Reporter marked for identification.

Mr. Castro: Yes, your Honor.

The Court: This will be Defendant's Exhibit N.

(The document referred to was thereupon marked Defendant's Exhibit N for identification.) [348]

Mr. Hilger: The Plaintiff rests, Your Honor.

The Court: This is an appropriate time for lunch then. We will reconvene at 2:00 o'clock, members of the jury. [349]

Thursday, September 26, 1957—2:00 o'clock P.M.

Mr. Castro: Ready for the defense. I would ask that Mr. Roberts be called.

Mr. Hilger: At this time, Your Honor, may I have an order excluding witnesses, not parties?

The Court: Have you got witnesses in the Court-room?

Mr. Castro: Yes, your Honor. They have not been excluded at anytime. They just came in now.

Mr. Hilger: They could not very well have been excluded prior.

The Court: Of course, we have been——

Mr. Castro: Proceeding without any such order.

The Court: You have some witnesses who are going to testify for the defense. I think counsel is within his rights to ask that witnesses be excluded before any witness on the same side testifies. We have a nice rest room outside for the witnesses. Who is your first witness?

Mr. Castro: Mr. John Roberts.

The Court: The other witnesses who are going to testify for the defense will please remain outside the Courtroom until their names are called.

JOHN ROBERTS

was called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court and the Jury?

A. John Roberts.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Roberts?

A. On Elk River in Eureka.

Q. How long have you made your home in the

(Testimony of John Roberts.)

Eureka Area? A. Oh, four years.

Q. What is your general business?

A. Well, mostly in lumberyards.

Q. Have you followed that a good portion of your working life?

A. Well, I would say about 15 years.

Q. And you are appearing here under a subpoena which was served upon you to appear at the trial of this case? A. Yes.

Q. Are you acquainted with Hyrum Jensen?

A. Yes.

Q. Were you acquainted with Harold Dee Jensen? A. Yes.

Q. How long have you known either one of those gentlemen? [351]

A. Well, I would say from January in 1955 I got acquainted with them.

Q. Are you acquainted with the Eureka Lumber Company in the City of Eureka? A. Yes.

Q. Did you become acquainted with Hyrum Jensen and Harold Dee Jensen with relation to the Eureka Lumber Company? A. Yes.

Q. Were you employed at the Eureka Lumber Company? A. Yes.

Q. In what capacity were you employed at the Eureka Lumber Company?

A. Yard foreman.

Q. When did you first go to work as yard foreman?

A. Well, I think I went to work about in March, possibly April, of 1955, and I think I worked prob-

(Testimony of John Roberts.)

ably a couple of months before I was made foreman.

Q. Then after you were made foreman how long did you serve as foreman at the Eureka Lumber Company?

A. Until, I think, about the first of June, 1956, I believe.

Q. Do you recall a fire which occurred at the Eureka Lumber Company on Monday, June 25, 1956?

A. Yes, but I was not there at the time.

Q. With relation to the date of that fire, can you tell [352] us approximately when was the last time that you worked?

A. I couldn't be sure, but it was, I think, in the neighborhood of ten days or possibly two weeks before the fire.

Q. I call your attention to the diagram which is on the blackboard here as Defendant's Exhibit A. The outline which I am tracing represents the ground plan of the Eureka Lumber Company Building at the corner of Commercial and Third Streets.

A. Yes.

Q. This to which I am pointing would be the Hayes Building, where the Hayes Second-Hand Store is, and Broadway would be to the left of the diagram. The railroad tracks are to the rear or top of the building, and we have referred to the shed or the open half of the building as being this particular area (indicating), and the room or office section of the building being the east half of the building.

(Testimony of John Roberts.)

The black lines represent walls, with the breaks in them representing doors or openings, and where there is a window it is marked "window."

Do you understand that diagram?

A. Yes, it is very plain.

Q. With reference to the shed, or the west half of that building, did your work take you into that shed?

A. Occasionally, yes.

Q. Were you there at the time a James Ragsdale leased a portion of the shed and built the sawmill? [353]

A. Yes.

Q. Was that sawmill under construction while you were foreman?

A. Yes.

Q. You see marked, "Sawmill," at a point here, representing a portable sawmill along the east section of that shed. Are you acquainted with that?

A. Yes.

Q. That was there at the time you were there?

A. Yes.

Q. Do you recall the Ragsdale people coming in to do their construction work, the origin of it?

A. Yes, I was there when the whole thing was built.

Q. At the time Ragsdale came in was there any redwood molding stored along this west wall running from the area which is marked six to eight feet to the Third Street entrance?

A. There was a little lumber. Most of that was what you call drop siding.

Q. What do you mean by drop siding?

A. A board that is thin on one side, on one edge,

(Testimony of John Roberts.)

and thick on the other, and laps over when it is put on a house.

The Court: You did not fix the time, counsel. You said at the time Ragsdale came in.

Q. (By the Court): Can you tell us approximately when Ragsdale came in? [354]

A. I don't know how long he was in there——

Q. The question is, do you know when he came in, when he started?

A. Well, to the best of my knowledge he was in there about two months.

Q. When did he come in? When, if you know.

A. I couldn't say for sure.

Q. (By Mr. Castro): When you said two months, would that be—with reference to what period?

A. Well, that would be before I left, which was about the first of June or sometime in there. I am not sure.

Q. At the time Ragsdale came in was there any redwood molding taken from any place in the building and stacked on the portable sawmill, which was along the east side?

A. Not that I recall.

Q. During the time that you were employed up to the time that you left there was any redwood molding stacked along the west wall in the area to which I am pointing, marked "Redwood Molding Kiln-Dried"? A. Not while I was there.

Q. During the time that you were there was there any redwood molding, kiln-dried, stacked in

(Testimony of John Roberts.)

the area of this rectangle marked "X-5, X-4," and "X-3"?

A. There could have been some in there—a small amount. [355]

Q. Approximately how much?

A. Well, on a rough guess I would say 1,000 feet.

Mr. Hilger: I will object and move to strike any rough guessing.

Q. (By the Court): Do you know how much was there?

A. I didn't hear what you said.

Q. Do you know how much there was there?

A. No, I don't know, but I would say possibly 1,000 feet.

Mr. Hilger: I didn't hear that.

The Court: He said he did not know exactly, but he would say about a thousand feet.

Q. (By Mr. Castro): At the time you left your employment ten days to two weeks before this fire how much lumber would you say, in your opinion, was in that shed area?

A. Well, I would say there was 2,000 feet in the whole building.

Q. Would you describe the character of the lumber which was in that shed?

A. There was some one-by-six and one-by-eight back in the further corner, the upper further corner, that was fairly good lumber, but there wasn't much left there. It was mostly all sold out.

(Testimony of John Roberts.)

Q. Will you mark that area to which you have reference? [356]

A. Well, it laid somewhere in there (indicating). This would be the back door, I think.

Q. Yes, I think that represents a door.

A. Along in this area in here, in there.

Mr. Castro: May we mark that "1 x 6," and "1 x 8," your Honor?

Q. (By Mr. Castro): That is one foot by six foot? A. One inch by six inches.

Q. What was the character of that one-by-six and one-by-eight? Was that redwood molding?

A. No, that was what you might call fence lumber.

Q. What was the character of the other lumber that was in that shed area?

A. Well, there was all sorts of molding, as you would use around — some of it around windows, doors, maybe baseboards, and a lot of smaller stuff.

Q. Generally, where was that stuff located?

A. Well, to begin with, across through here was some, and down through this way was some, a little further down, a little further to the door, maybe (indicating). I don't know what this represents.

Q. The sawmill in there is indicates as being along there.

A. Down here, and reaches in to about there, I would say, [357] right close to the door, and there was some molding in here, and there was some across this way (indicating). In here was an old edger.

(Testimony of John Roberts.)

Mr. Castro: May we mark "Edger" where he has indicated an edger?

The Witness: The last time I was in there there was an edger. The sawmill was extending from this door back in through here (indicating).

Q. (By Mr. Castro): You are indicating the front door on Third Street. Is that the Ragsdale sawmill?

A. Yes, that is where it was built.

Q. How far did it extend into the shed?

A. Well, I don't know how long the building is, or how long the sawmill was, but there is quite a little room in back.

Q. During the time that you worked at the Eureka Lumber Company did you see a quantity of redwood fencing in the shed building which would total approximately 35,000 board feet?

A. No.

Q. Did you see in the shed during any of the time that you worked there vertical grain redwood molding of a volume of approximately 66,000 board feet?

A. No.

Q. And during the time that you worked there did you see [358] any activity carried on in the nature of remanufacturing reject molding? Do I make myself clear?

A. No.

Q. Was molding bought during the time that you worked there?

A. Not that I recall, no. This fence lumber we were talking about on this corner was bought after

(Testimony of John Roberts.)

I came. This molding was in there when I went in there.

Q. You are indicating this area which is in the nature of X-5, which I will mark "Molding," was there at the time you went to work? A. Yes.

Q. On the day of the fire were you working some place?

A. I was baling hay in the country.

Q. Was that in the area of Eureka?

A. Oh, I would say maybe six miles from Eureka.

Q. Did you learn about the fire?

A. I even heard the fire whistle at noon time.

Q. Later on in the day did you receive any message concerning Hyrum Jensen? A. Yes.

Q. After you received the message concerning Hyrum Jensen did you see Mr. Jensen that day?

A. I saw him that evening after dinner.

Q. Where did you see him? [359]

A. Down at the mill, at the yard.

Q. That is the Eureka Lumber Company yard?

A. Yes.

Q. Did you have a conversation with Mr. Hyrum Jensen? A. A short one, yes.

Q. Will you state who was present?

A. Just Mr. Jensen, my wife and I.

Q. Will you state what the conversation was?

A. He asked me how much lumber I thought burned up in the shed, and I told him I didn't think there was a thousand feet in there. He told me he

(Testimony of John Roberts.)

had put 20,000 feet, about 20,000 feet, in a few days before, or a short time before.

Q. Up to the time that you left there in the month of June had 20,000 feet been put in?

A. After I left.

Q. That is what he was referring to?

A. Yes.

Q. Was there anything else in that conversation?

A. Nothing of any importance. I talked about the fire being too bad, and a lot of destruction.

Mr. Castro: I have no further questions, your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Roberts, you were not employed as a tallyman at [360] the Eureka Lumber Company? A. Tallyman? No.

Q. You never made any tallies of lumber?

A. Yes, lots of them.

Q. I mean at the Eureka Lumber Company, inside the shed?

A. I tallied lumber that I sold, yes.

Q. That was outside in the yard?

A. Well——

Q. Basically outside in the yard, was it not?

A. Yes.

Q. You did not concern yourself to any great degree with the business inside this building, did you?

A. The business was so small inside the building——

(Testimony of John Roberts.)

Q. (By the Court): That is not what he asked you. He didn't ask you how big the business was. He asked you whether you concerned yourself with the business inside the shed.

A. Well, I would say no.

Q. (By Mr. Hilger): After this fire you made a sworn claim for wages with the Labor Commission, did you not, against the Eureka Lumber Company, amounting to several hundred dollars, perhaps running into the thousands of dollars?

A. Not several hundred, no. I think it is around \$160.

Q. You are aware, of course, that the claim that was made [361] and presented to Mr. Jensen amounted to about \$1,260, aren't you?

Mr. Castro: We object to that. The claim would be the best evidence.

Mr. Hilger: I asked if he was aware of it.

The Court: It is proper cross examination; overruled. He is asking him if he is aware of something.

A. I asked them to collect my wages.

Q. (By Mr. Hilger): You are aware of the amount they went after when they went to collect those wages, aren't you?

A. The \$160, or whatever it was, close to that.

Q. You are aware that they made claim as a result of your claim upon Mr. Jensen for \$1,200 and some odd?

A. They said they would collect waiting—I think they called it waiting time.

(Testimony of John Roberts.)

Q. (By the Court): The question that he asked you was, did you know——

Who was it you said?

Mr. Hilger: The Division of Labor Enforcement.

Q. (By the Court): ——the Division of Labor Law Enforcement made a claim on your behalf in excess of \$1,200 against Mr. Jensen? A. No.

Q. You did not know that? [362]

A. No.

Q. (By Mr. Hilger): You did know they made a claim in the amount of several hundred dollars, didn't you?

A. They never did tell me any amount. They were going to collect for a waiting period for my June's wages, I think it is.

Q. And you are aware that that was disposed of for \$80.00 by the Division of Labor Law Enforcement? A. I didn't get that.

Q. You are aware that that was disposed of for \$80.00, weren't you? A. Disposed of?

Q. Yes.

The Court: Settled.

Mr. Hilger: No; I mean disposed of after hearing.

A. Not to my knowledge, no.

Q. (By Mr. Hilger): You did not show up at the hearing, did you?

A. There was no hearing that I knew anything about.

Q. Is that the same kind of testimony that you

(Testimony of John Roberts.)

made when you estimated the thousand feet of lumber in here, Mr. Roberts?

Mr. Castro: I object to that as argumentative, your Honor.

The Court: Sustained. [363]

Q. Do you know how big a pile a thousand feet of lumber is? A. I have a pretty good idea.

Q. Just how big is it?

A. Well, get your pile of lumber. I can check it, tally it, and tell you exactly.

Q. You just tell us now how big a pile a thousand feet of lumber is, Mr. Roberts.

A. Well, I would say probably most of ours there was about three feet wide, and the average length, we will say 16 feet in length, and possibly it would be close to 30 inches high.

Q. You are aware that an average unit of lumber contains about 2,000 board feet, aren't you?

A. You were not asking for that, you know.

Q. I asked you now. You are aware that an average unit of lumber contains 2,000 feet?

A. An average unit?

Q. The average unit is about three feet high, four feet wide, and about sixteen feet long, isn't it?

A. Well, close to that.

Q. A half of that would be a little old pile two feet high, three feet wide, and sixteen feet long, wouldn't it? That would contain a thousand feet?

Mr. Castro: I object to that, your Honor. It is a matter of mathematics.

Mr. Hilger: I am asking him if that is not true.

(Testimony of John Roberts.)

Q. (By Mr. Hilger): Yes or no.

A. How big did you say?

Q. Two feet high, three feet wide, and sixteen feet long.

A. Would be a thousand feet?

Q. That would be approximately right, wouldn't it? That is a half a unit? A. No, it is not.

Q. How much is a half a unit?

A. Well, a unit is—well, we would say three feet wide. They run a little wider than that, usually.

Q. How much wider? A. Oh,—

Q. How much wider?

A. Well, they are different widths, so far as that goes.

Q. Approximately how much wider on the average?

They have to be a certain size to be hauled to fit on a truck. You know that, don't you, Mr. Roberts?

A. Yes.

Q. How much wider than three feet?

A. I can't tell you exactly, but they are somewhere between three feet and three and a half feet.

Q. All right. I will settle for three and a half feet. Three and a half feet would be a thousand feet of lumber, wouldn't it?

A. About that, yes.

Q. And that is two-by-fours, where you are dealing in a board measure that is coming to one and three-quarter inches for the full two-inch measure. You are not counting a double-measure like you do

(Testimony of John Roberts.)

in molding—or do you know anything about double-measure in moldings?

A. Well, molding usually sells by the linear foot.

Q. Yes, but in board foot measure it would be double, wouldn't it? A. Some of it.

Q. In the units we are talking about there are two-by-fours and two-by's dimension lumber, isn't that so, when we are talking about the cubic content of lumber of a thousand board feet?

A. Cubic content? You are talking about board feet?

Q. Let us talk about board feet. And the board feet we are talking about is made up of one and three-quarter inches, having a nominal two-inch thickness, give or take one-sixteenth of an inch?

A. If it is surfaced. If it is rough it would be more.

Q. Seven-eighths of the nominal two-inch thickness; and a thousand feet of molding that is on a half-inch basis would [366] be even a smaller pile, wouldn't it? A. Yes, it would.

Q. You have a pile of lumber all over in this area (indicating). You have shown us some here, some down here. And you ask us to believe that is only a thousand board feet?

Mr. Castro: I object to that as argumentative, your Honor.

The Court: I think probably it is argumentative, counsel. Sustained.

Mr. Hilger: That is all.

The Court: Any further questions?

Mr. Castro: I have no questions. May the witness be excused, your Honor?

The Court: Very well.

(Witness excused.)

JOHN E. WILSON

called as a witness by the defendant, being first duly sworn, thereupon testified as follows:

Q. (By the Clerk): Will you state your name to the Court and Jury?

A. John E. Wilson.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Wilson? [367]

A. In Eureka.

Q. How long have you lived in the Eureka area?

A. Well, I have lived there two years and two months this last time.

Q. Did you live there prior to two years ago?

A. I first came to Eureka, or Arcata, 15 years ago.

Q. In general, what type of work have you followed? A. Sawmill work, and woods work.

Q. You are a married man with a family?

A. Yes, I am.

Q. Are you acquainted with Hyrum Jensen?

A. Yes.

Q. Are you acquainted with Harold Dee Jensen? A. Yes.

Q. Are you acquainted with the Eureka Lumber Company in the City of Eureka? A. Yes.

(Testimony of John E. Wilson.)

Q. Did you ever go to work at the Eureka Lumber Company? A. Yes.

Q. About when did you go to work at the Eureka Lumber Company?

A. It was the latter part of March a year ago, I believe.

Q. March of 1956? A. Yes.

Q. What type of work did you do at the Eureka Lumber [368] Company?

A. Well, just general work, whatever there was to do.

Q. The diagram on the wall to your left, Exhibit A, represents the floor plan of the Eureka Lumber Company Building, and this line represents the partition between what we have been calling the shed and the office or the room section of the building, and the open air storage for lumber would be to the left of that diagram. The black lines represent the walls and the openings represent the doorways. A portable sawmill, which was located in the east half of the shed, is indicated between these lines that I am pointing to. Third Street in front, Commercial Street is here, a second-hand store is on that corner, the railroad tracks are at the top (indicating).

Do you think you understand that diagram?

A. Yes, I do.

Q. Did you have any work that took you into the shed of that building?

A. I never did work in the shed, no.

(Testimony of John E. Wilson.)

Q. Did you have work which took you in the shed of the building?

A. I was in the shed a few times. Sometimes we parked the lumber stacker there at night.

Q. What is a lumber stacker?

A. Well, it is a machine that they use to pick up and load lumber, and stack it. [369]

Q. Where did you park the lumber stacker?

A. Just inside the back door from the railroad.

Q. Could you indicate where that lumber stacker was parked?

A. Well, we always parked them right at the back door, right there (indicating).

Mr. Castro: May we mark that "Stacker"?

The Witness: In rainy weather we parked them there. If it looked like it was going to be clear, it was left outside.

Q. (By Mr. Castro): Do you remember a saw-mill being built in the shed area by a man by the name of James Ragsdale? A. Yes, I do.

Q. Were you working during the period of the construction of that sawmill? A. Yes.

Q. As part of your duties did you drive truck?

A. Yes, I did, some.

Q. Did you make deliveries of lumber and other merchandise from the Eureka Lumber Company to people who were buying it?

A. A few times, yes.

Q. Were you working on the day before the fire at the Eureka Lumber Company, on June 25, 1956?

A. No, I was not.

(Testimony of John E. Wilson.)

Q. Had you reported to go to work that morning? A. Yes.

Q. Was anybody taken on to work on the morning of the fire? A. Nobody that I knew of.

Q. When was the last time prior to the day of the fire that you were at the plant?

A. I think it was on Saturday. We sorted lumber for awhile in the morning, and along about noon Ragsdale started loading his mill, and I helped load out the mill.

Q. Was that the Saturday before the fire?

A. Yes.

Q. Where was the mill when you started to load it out on the Saturday before the fire?

A. The mill had been pulled out in front of the building on Third Street.

Q. Did you have occasion on that Saturday to go into the shed? A. Yes.

Q. What took you into the shed on the Saturday before the fire?

A. Mr. Ragsdale had some pieces of iron and part of his mill that was in boxes inside the shed that I picked up with the lumber stacker and loaded on the truck for the mill. [371]

Q. Prior to the start of the fire had you ever gone into the shed to look at lumber, to take it on an order?

A. Only one time that I can remember of that I ever took any lumber out of there.

Q. During the time that you worked there did you ever stack any lumber in the shed?

(Testimony of John E. Wilson.)

A. No.

Q. Or did you ever see any lumber being stacked in the shed? A. No.

Q. On the Saturday before the fire was there redwood molding stacked along the west wall of the shed?

A. I didn't see any redwood molding there, no.

Q. Did you see any redwood molding stacked in the shed on the Saturday before the fire?

A. No, I did not.

Q. Did you see any lumber in the shed the Saturday before the fire?

A. The only lumber I remember seeing in there was scraps that was scattered around on the floor there.

Q. Where was that lumber located?

A. Well, as you come in the back door where we parked the cars there was scrap lumber floors. A dirt floor. It was on the ground, scattered around there.

Q. At any time during the period that you worked did you [372] see vertical grain redwood molding stacked with or without stickers in that shed area? A. No.

Q. After the fire did you do any work for Eureka Lumber Company?

A. Yes, I worked a few days.

Q. Were your wages paid up at the time of the fire? A. No.

Q. Are they paid up now? A. No.

Q. Approximately how much is owed you in

(Testimony of John E. Wilson.)

wages? A. Something around \$100.

Mr. Castro: I believe those are all the questions I have, your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Wilson, your job was sort of roustabout, wasn't it? A. Yes, it was.

Q. You stacked lumber, and sorted it, outside, mostly? A. Yes, sir, I did.

Q. That is all you did for these people at the Eureka Lumber Company was that type of labor?

A. That is right.

Q. On the Saturday before the fire you say before you had anything to do with this Ragsdale mill it had already been [373] pulled out of the building, is that right? A. That is right.

Q. And you went into the building to get some irons for Mr. Ragsdale? A. Yes.

Q. How far into the building did you go at that time?

A. I came in the back door with a small lumber stacker and pretty well—about two-thirds of the way in, I would say, was a box of pieces to his mill. It was a box about so big (indicating), of iron, that I picked up.

Q. Then you backed up with your stacker?

A. Out the back door, yes.

Q. How high were these stacks of scrap around, as you described them?

A. The only scraps I remember seeing were just on the floor around the back door where we dropped the stacker. It was just around on the floor.

(Testimony of John E. Wilson.)

Q. You made a claim, also, against the Eureka Lumber Company, did you not, for wages that you said you had not received? A. That is right.

Q. You swore you had not received them?

A. Yes.

Q. And you had, in fact, received them in cash, hadn't you? [374] A. No.

Q. It is a fact your matter was dismissed by the Division of Labor Law Enforcement when you refused to swear that you had not been paid, isn't that true?

A. I asked them to dismiss it.

Q. Yes, I am sure you did.

That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Wilson, would you indicate with a pencil where you drove the stacker in to remove the box?

A. As I remember there was, well, I think the one mill was in here, and I think the iron was in this area, in front of the mill here (indicating).

Q. Will you mark it with an "X"?

A. (Witness marks on diagram.)

Q. Then you entered from the railroad side of the building? A. Yes.

Q. Can you tell me which of these doorways you came in?

A. Well, it was the doorway we always came in to park the stackers. I would say it was this door (indicating).

(Testimony of John E. Wilson.)

Q. Will you draw a line through the door down to the box?

A. I think I came straight through. As nearly as I can remember, the building was empty. [375]

Mr. Castro: May we make that line a little heavier and mark it "W-1," at the south end, and "W-2," at the north end?

You can take the chair again.

I believe those are all the questions I have, your Honor.

Mr. Hilger: I have a question or two more.

Recross Examination

Q. (By Mr. Hilger): You are appearing here at the request of the defendant, aren't you?

A. I was subpoenaed to appear here, yes.

Q. You were subpoenaed by the defendant, too, weren't you? A. Yes.

Q. How much are you getting paid to come down here to testify? A. My expenses.

Q. How much are your expenses?

A. Well, my wages are \$16.80 a day. My wife had to come with me. She makes between \$10.00 and \$15.00 a day. And we have five children, and we had to make arrangements for our children we left there, which probably will amount to \$8.00 a day.

Q. Keep going. How much did it cost you to travel down [376] here?

A. I haven't kept a record of it.

Q. How much are you going to put in for?

A. Well, I had an understanding with Mr.

(Testimony of John E. Wilson.)

Young up there that he would take care of it. He asked if \$71.00, in addition to the \$52.00 he give me, would take care of everything, and I said it would.

Mr. Hilger: I will bet it would. Thank you.

Further Redirect Examination

Q. (By Mr. Castro): Mr. Wilson, you have a family of five? A. That is correct.

Q. What is the age of the eldest?

A. Fifteen is the eldest.

Q. And the youngest? A. Six.

Q. Have you been sick in the past?

A. I have been sick——

Mr. Hilger: I will object to this as being immaterial.

The Court: I will sustain the objection.

Q. (By Mr. Castro): Was it necessary because of your physical condition that your wife was required to make the trip with you?

Mr. Hilger: I object to that as leading. [377]

The Court: I will sustain the objection.

Q. (By Mr. Castro): Mr. Wilson, have you told anything but the truth concerning your knowledge of that shed? A. No.

Mr. Castro: I have no further questions.

The Court: That is all.

Mr. Castro: May the witness be excused?

The Court: Yes, he may be excused.

(Witness excused.)

ORLEN HOWARD

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Will you state your name to the Court and Jury?

A. Orlen Howard.

Direct Examination

Q. (By Mr. Castro): Where do you live, Mr. Howard? A. I live in Eureka, California.

Q. How long have you made your home in the Eureka area? A. Fourteen years.

Q. Married man with a family? A. Yes.

Q. You appear here under a subpoena?

A. That is right.

Q. And you received a fee with your subpoena, did you? A. I did.

Q. And the amount of that fee was \$52.00?

A. That is right.

Mr. Castro: Will the Court take judicial notice that that is the statutory fee required for witnesses from Eureka to the City of Sacramento?

The Court: I don't know. If you say it is——

Mr. Castro: That is what the marshal's office told us.

The Court: Maybe it would have been better for all concerned, counsel, if you had tried this case where it started, up in Eureka. You would have saved an awful lot of expense and trouble.

Mr. Castro: I agree with your Honor.

The Court: You moved it to the Federal Court.

(Testimony of Orlen Howard.)

Mr. Castro: Yes. But there is a Federal Court, I understand, in Eureka. But they sit in Sacramento.

Q. (By Mr. Castro): Mr. Howard, what is your business?

A. I am a paid fireman in Eureka.

Q. How long have you been a paid fireman in the City of Eureka? [379] A. Nine years.

Q. Is a paid fireman a full-time job?

A. Yes, it is.

Q. Do you have any part-time job on your day off, or anything of that kind?

A. Just occasionally; just subject to call when they are short-handed.

Q. Were you on duty in the Fire Department on June 25, 1956, when a fire took place at the Eureka Lumber Company? A. Yes, I was.

Q. Did you respond to the fire alarm?

A. Yes.

Q. About how far is it from the Fire Department to the Eureka Lumber Company Building?

A. Oh, I would say in the vicinity of seven blocks.

Q. How did you go to the scene of the fire?

A. I drove the truck down to C Street, and then over on Fourth, down Fourth to Commercial, and from Commercial Street over to Third.

Q. Were you the lead truck?

A. No, I was the second machine.

Q. (By The Court): You mean a fire truck, I take it? A. Yes, sir. [380]

(Testimony of Orlen Howard.)

Q. (By Mr. Castro): Where did you bring your truck to a stop when you reached the scene of the fire?

A. I brought my truck to a stop on the Third Street side headed towards Broadway from Commercial.

Q. The diagram which is Exhibit A, I explained that to you just before the two o'clock session.

A. Right.

Q. Do you feel that you understand that diagram? A. I do.

Q. After you parked your truck, then, in that Third Street area——

A. I parked it just long enough to unload my line and go into a hydrant.

Q. What hydrant did you tie into?

A. I tied into Third and Broadway.

Q. That would be to the west? A. Right.

Q. Would that be near Mr. Musser's truck?

A. It would be right on the corner by his place.

Q. And after you parked your truck there and tied in your line where did you take your line?

A. That line went in on the west side where the main part of the fire was.

Q. Do you know who took the line in?

A. No, I couldn't say which one of the firemen took it. [381] There were two other lines laid in the same place.

Q. Did you take a line into any part of the building?

(Testimony of Orlen Howard.)

A. Yes, I took a line off the Commercial Street side between Second and Third on the side door.

Q. There is a door which has been marked here "Loading Door," with a Roman Numeral "II." Would that be the door?

A. That would be the door I went through, yes.

Q. Was that door forced open so that you could get into it? A. Yes, it was.

Q. Who forced it open?

A. That I don't recall. We had several men working there.

Q. I will show you a photograph taken on August 10, 1956. Do you recognize that photograph?

A. Yes, that is on the commercial street side, where the side door is.

Q. Does that indicate the door through which you entered the building? A. Yes, sir.

Q. When you entered the building in what direction did you go after you entered the loading door?

A. Went into the west, on into the building, in that one storage room there right off of that door, where the fire had burned through in one place.

Q. Would you take the pointer and point out your course as you came through the loading door?

A. When I came through the door here there had been a fire truck in about this area, here (indicating).

Q. Will you put an "X" at that area?

A. (Witness marks on diagram.)

(Testimony of Orlen Howard.)

Mr. Castro: May we mark that "H-1," your Honor (marking on diagram)?

Q. (By Mr. Castro): Did you observe fire coming into that room at any other point than H-1 when you went in there?

A. There was little spot fires in between the ceiling, in the rafters which the ceiling was nailed to. We had to pull the sheet rock down and put those out. There wasn't a tremendous lot of fire, but there was fire in between.

Q. I will show you another photograph taken on August 10, 1956. Does it show the ceiling area from which you pulled down the ceiling?

A. Yes, it does, very clearly.

Mr. Castro: I offer that photograph in evidence as defendant's exhibit next in order, your Honor. I apparently missed on offering the other photograph. I will offer it first.

(Whereupon the photograph referred to was marked Defendant's Exhibit O in evidence.)

Mr. Castro: That is the photograph on the Commercial Street side, showing the side door.

(Whereupon the photograph referred to was marked Defendant's Exhibit P in evidence.)

Q. (By Mr. Castro): Where did you go in that storage room? What was the line of your progress? What direction did you take?

A. We went to the south area. Quite a little fire had come in from this other side by the steps and in the office part, and we worked along in there in order to put a stop in there.

(Testimony of Orlen Howard.)

Q. You are indicating the area marked "Stairs"?

A. Right in here (indicating). We worked right on down. There were several fellows with me. We called out 200 volunteers on that fire.

Q. I show you Exhibit G. Does that show the front end of that office to which you were proceeding, on the downstairs side?

A. Yes. The window is facing the Third Street side.

Mr. Castro: May we show these three photographs to the jury at this time, your Honor?

The Court: Very well.

(Whereupon the photographs referred to were handed to the jury.)

The Court: Is that all of the witness? [384]

Mr. Castro: Yes, your Honor. I do have one or two more questions of the witness.

Q. (By Mr. Castro): When you were in that office area could you tell where the fire was coming from? You have indicated it had burned through at a point, H-1.

A. That is right. The main part of the fire was coming from the west side of the building.

Q. At any time did you enter the room which I am now pointing to, and which has been referred to as the southwest room, before you went upstairs?

A. No, I did not.

Mr. Castro: Those are all the questions I have on direct examination.

The Court: Any questions?

(Testimony of Orlen Howard.)

Mr. Hilger: Yes, I have one question.

Cross Examination

Q. (By Mr. Hilger): Did you say you had to call out 200 volunteers?

A. We have 200 volunteers in the City of Eureka, and we pulled a general alarm, and that is to call all the volunteers out.

Q. That was a pretty big fire, then, wasn't it?

A. It was a big fire.

Q. It was a hot fire, then? [385]

A. Very hot.

Mr. Hilger: That is all.

(Witness excused.)

ALFRED BREEN

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Will you state your name to the Court and to the Jury?

A. Alfred Breen.

Direct Examination

Q. (By Mr. Castro): Where do you live, Mr. Breen? A. Eureka, California.

Q. And you have lived there approximately how long? A. Approximately 20 years.

Q. Are you a married man with family there?

A. Yes.

Q. What is your business?

A. I am employed by the City of Eureka as a fireman—Eureka Fire Department.

(Testimony of Alfred Breen.)

Q. Is that full-time duty with the Fire Department? A. Yes, sir.

Q. Approximately how long have you been in the Fire Department? [386]

A. I am completing my sixth year.

Q. Were you on duty the day of June 25, 1956, when the fire took place at the Eureka Lumber Company? A. Yes.

Q. About what time was the alarm received at the Fire Department? A. At 12:21.

Q. Is that morning? A.M. or P.M.?

A. That would be A.M.

Q. Morning? Was it in the daylight hours?

A. Daylight hours.

Q. That is P.M. A. P.M. Excuse me.

Q. Have you ever been a witness before?

A. No.

Q. You just relax and take it easy. Did you respond with one of the trucks to that fire?

A. Yes.

Q. Were you in the first truck, the second truck, or how did you get there?

A. The lead machine, the first truck.

Q. Where was that machine brought to a stop?

A. It was brought to a stop at Third Street and Commercial.

Q. What was done at that time so far as you were concerned? [387]

A. My duty at that time was to break the hose and make the connection of the nozzle.

Q. Did you perform that job? A. Yes.

(Testimony of Alfred Breen.)

Q. Then what did you do?

A. I led into the fire with a hose line?

Q. Where did you lead into the fire?

A. On the west side of the building.

Q. Before the two o'clock session did I explain to you this particular diagram? A. Yes, sir.

Q. Do you understand the locations on it so I could ask you questions? A. I do.

Q. Which side of the building did you enter from? A. It would be the west side.

Q. Was there a door through which you entered, or did you have to cut an entrance?

A. I had to break an entrance.

Q. Approximately how far from the Third Street side did you break that entrance?

A. I would say about a third of the way, third of the building in from the street.

Q. I show you a photograph taken August 10, 1956. Do you recognize the content of that photograph? [388] A. Yes, I do.

Q. Is that a view taken from the Broadway side of the building looking toward the west side of the building? A. That would be, yes, sir.

Q. Does that photograph show the area through which you made your entry into the shed?

A. Yes.

Mr. Castro: We will offer this photograph in evidence as defendant's exhibit next in order.

(Whereupon the photograph referred to was marked Defendant's Exhibit Q in evidence.)

Q. (By Mr. Castro): When you made your

(Testimony of Alfred Breen.)

entry into the west wall there were you playing a hose ahead of you, playing the force of the hose ahead of you? A. Yes.

Q. Just describe where you worked to as you fought that fire.

A. From this diagram?

Q. Yes. There is a pointer right behind you.

A. The access hole that I had to cut, as I said, was approximately a third of the length of the building, and that would take me into this area (indicating).

Q. You are indicating an area near the mark X-3. What did you encounter when you got into that area so far as [389] equipment was concerned?

A. There was a stacker, or a lumber-piler, a mechanical affair—a lumber stacker.

Q. Did you go around that lumber stacker?

A. Yes, I did.

Q. Which side did you go around that lumber stacker?

A. I went to the right side of the stacker.

Q. Then where did you go?

A. Over the right side of the stacker, forward.

Q. When you say forward, would you be going toward the east side of the building?

A. Yes. My advance would be in this direction (indicating).

Q. Did you encounter a portable sawmill in the building? A. Yes.

Q. Did you encounter any lumber in the building as you approached, prior to the time you

(Testimony of Alfred Breen.)

reached the left side that you have referred to?

A. No.

Q. About where did you first encounter lumber in the building?

A. The lumber that I encountered was forward of the stacker, over in about this area (indicating).

Q. Where was it with relation to the bunker or stop end of the portable sawmill? [390]

A. At the end.

Q. Would that be the end toward the railroad tracks? A. Yes.

Q. Was any of that lumber that you saw there stacked? A. No.

Q. Just describe the lumber as it appeared to you when you saw it.

A. It appeared to be scattered, just like it was thrown in a heap.

Q. Did you put the fire out in that area where you saw this lumber? A. Yes.

Q. Did you have any difficulty putting the fire out in that area where you saw the scattered lumber?

A. Well, as I remember, it was very stubborn.

Q. What does that mean to you?

A. To me it means the pile would have to be overhauled. It would have to be taken up piece by piece with a pickaxe or a hook, pulled out and water played on it at the same time to knock it down.

Q. Is that what was done in that area?

A. Yes.

(Testimony of Alfred Breen.)

Q. While you were fighting the fire in that area did you make any observation concerning any odors with relation to the fire that you were fighting?

Mr. Hilger: What was that word?

Mr. Castro: "Odors."

Mr. Hilger: Odors. Smells?

Mr. Castro: Smells.

A. Yes, there was a smell at that particular time.

Q. (By Mr. Castro): Would you describe the smell that you noticed at that point?

A. I would say that the smell was petroleum products.

Q. After you got the fire out in that scattered lumber did you see any lumber stacked any place in that shed? A. You mean piled lumber?

Q. Yes; stacked. A. No.

Q. Did you have an opportunity later on to look at this lumber that you had taken out from the pile that you have described?

A. Yes, I had to travel back and forth across it.

Q. Would you describe the character or kind of lumber that was?

A. Well, to me it was trash.

Q. What does that mean to you?

A. Well, scrap.

Q. Are you familiar with vertical grain red-wood molding? A. I could recognize it. [392]

Q. Did you see any of that in this area that you have been describing? A. No.

(Testimony of Alfred Breen.)

Mr. Castro: May I show the photograph now to the jury?

The Court: Very well.

(Whereupon the photograph referred to was handed to the jury.)

Q. (By Mr. Castro): I show you a second photograph taken August 10, 1956. Does that also show the west side? A. Yes.

Q. Does that also show the area through which you cut your hole? A. Yes.

Mr. Castro: May we offer that in evidence as defendant's exhibit next in order?

(Whereupon the photograph referred to was marked Defendant's Exhibit R in evidence.)

Q. (By Mr. Castro): Did you observe any redwood molding of any kind stacked along the west wall in the area which is marked "Redwood Molding"? A. No.

Q. After the fire, after you were in there, apart from [393] the portable sawmill itself, the diesel engine to the left, were there any other obstructions in the way of equipment in the building in that shed area? A. In this main part?

Q. Yes. A. I didn't encounter any.

Q. Did you encounter any lumber as you fought that fire until you reached the bunker end of that sawmill? A. No.

Mr. Castro: Those are all the questions I have on direct, but I would like to show the jury this photograph.

(Testimony of Alfred Breen.)

(Whereupon the photograph referred to was handed to the jury.)

Mr. Castro: I believe one of our witnesses has come into the courtroom, your Honor,—a witness not on this subject matter. But I think you had better instruct him to leave.

The Court: Tell him to leave.

Aren't these photographs repetitious? I have looked at some of them. So many of them cover the same side of the building.

Q. (By Mr. Castro): Is that the manner in which you pulled out the lumber at the edge of the bunker? A. Yes. [394]

Mr. Castro: We will offer it in evidence as defendant's exhibit next in order.

(Whereupon the photograph referred to was marked Defendant's Exhibit S in evidence.)

Mr. Castro: Those are all the questions I have on direct examination.

Cross Examination

Q. (By Mr. Hilger): Mr. Breen, you made your entry here about a third of the way down the west side, is that right? A. That is correct.

Q. That would be along about in here, somewhere along in there (indicating)?

A. That is right.

Q. And you encountered, just inside where you made your entry, a lumber stacker type of machine, is that correct? A. That is correct.

Q. Let us mark that down if we may. Would

(Testimony of Alfred Breen.)

you like to step up here and mark where you found that stacker?

A. I would say it was about in this position, here (indicating).

Q. Draw us a square and label it "Stacker," if you will. A. (Witness marks on diagram.)

Q. Where did you find the pile of lumber as you worked your way across? You went directly east, did you not? [395] A. Yes.

Q. Where was the pile of lumber?

A. The lumber was at this platform, here, if this square represents the sawmill (indicating).

Q. Yes. Will you write in there "Lumber," if you will, where you think would be proper?

A. What does this line represent?

Q. Let's see. A. The outside of the——

Q. No, the sawmill is down here, I think, next to the door. The sawmill extends 40 feet into the building. It would start here and go up approximately 40 feet this way (indicating). Now, if you want to find the end of the sawmill, that is about where it is.

A. That is the center wall. This is lumber in this area (indicating).

Mr. Hilger: Do you want that labeled?

Mr. Castro: Please do.

Q. (By Mr. Hilger): That was a stubborn pile of lumber, you say, to be put out. It had to be broken apart and extinguished?

A. Yes, I would say it was, yes. I did.

(Testimony of Alfred Breen.)

Q. And you worked on that after you first got in the fire for some period of time?

A. Yes. [396]

Q. The rest of it was burning elsewhere while presumably other people were working on it?

A. That is correct.

Q. This area up here was blazing, was it not, and all through there during that period of time?

A. The fire, as I saw it—my work was concerned with this portion of the building, the overhead and the stanchions.

Q. And there was flame through here while you worked on the flame down here (indicating)?

A. It was burning, yes, sir.

Q. It was burning over here, too, wasn't it?

A. Yes.

Q. You did not make any inspection to see whether there was any lumber until after you got through putting the fire out, did you?

A. I was concerned with the fire in that particular spot.

Q. And not in any other spot. It was not your object or concern to put out the fire some place else; you were putting it out——

A. Where I was working.

Q. That is right.

A. You might say where I was detailed.

Q. The rest of it was burning like Rome while you were putting this down?

A. That is right. [397]

(Testimony of Alfred Breen.)

Mr. Castro: I object to the question as argumentative.

The Court: I am sorry, I didn't hear what you said.

Mr. Castro: I will withdraw the objection.

Q. (By Mr. Hilger): Who turned in the alarm, Mr. Breen? A. I don't know.

Q. You didn't receive it? A. No, sir.

Mr. Hilger: That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Breen, was there overhead fire in this shed area?

A. Yes, there was.

Q. What was that overhead fire from?

A. What was it from?

Q. Yes. I mean, what was burning in the overhead?

A. Well, two-by-fours, or trusses, the stanchions, but there was fire over our head in the spot that I was working.

Q. That was where the fire was being transmitted through that shed area? A. Yes.

Mr. Castro: Those are all the questions I have.

The Court: As soon as the jury finishes with the [398] photograph we will take a recess.

(Witness excused.)

(Recess.)

NEAL A. JENSEN

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Will you please state your name to the Court and to the Jury?

A. Neal A. Jensen.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Jensen?

A. Usually in Eureka, California.

Q. Are you related to the Hyrum Jensen who is the plaintiff in this case? A. No, I am not.

Q. You have been subpoenaed to be a witness here, have you not? A. I have.

Q. Are you acquainted with Hyrum Jensen?

A. Yes, sir.

Q. Were you acquainted with Harold Dee Jensen? A. I was.

Q. Were you acquainted with the Eureka Lumber Company in [399] the City of Eureka?

A. Yes, sir.

Q. Did you ever work at the Eureka Lumber Company? A. Yes.

Q. When did you work at the Eureka Lumber Company?

A. I worked there two different times. I think possibly the first time was in about 1952.

Q. Did you work there later?

A. And I worked there in 1956, I believe,—1955 or 1956, after the fire.

Q. Do you recall the fire that occurred at the

(Testimony of Neal A. Jensen.)

Eureka Lumber Company? A. Yes, sir.

Q. Were you in the city on the day of that fire?

A. I was.

Q. In the vicinity of the Eureka Lumber Company at the time you became aware of the fire?

A. Yes, sir.

Q. Where were you at the time that you first became aware of the fire?

A. I was in the office of Louis H. Hess Company, which was just across the street on opposite corners.

Q. From the Eureka Lumber Company?

A. Yes, sir.

Q. I will show you a photograph. Does that show the [400] Hess office? A. Yes.

Q. And the Eureka Lumber Company?

A. That is right.

Mr. Castro: I offer it in evidence as defendant's exhibit next in order.

(Whereupon the photograph referred to was marked Defendant's Exhibit T in evidence.)

Q. (By Mr. Castro): What had brought you to the Hess office on that occasion?

A. Well, I had gone down to the Eureka Lumber Company's office to get some lumber.

Q. Was anybody with you on that trip?

A. Yes.

Q. Who? A. Mr. Sterling Johnson.

Q. Did you pick up some lumber on that occasion? A. I did, yes.

Q. Where did you pick up the lumber?

(Testimony of Neal A. Jensen.)

A. I picked up the lumber just directly across Third Street from the office entrance, the office of the Eureka Lumber Company.

Q. This diagram, which is Exhibit A, I explained that to you shortly before two o'clock to-day? [401] A. Yes.

Q. Do you understand it? A. I do.

Q. The Third Street you had reference to is the lower portion? A. That is right.

Q. The office section that you have reference to was this portion of the building (indicating)?

A. The office is in the corner of Commercial and Third Street.

Q. And you picked up some lumber in a space south, or across Third Street?

A. Across Third Street from the lumber company's office.

Q. Was Mr. Johnson with you when you were picking up that lumber? A. Yes.

Q. Before picking up that lumber had you gone into the office of the Eureka Lumber Company?

A. I had.

Q. Did you see anybody when you went into the office of the Eureka Lumber Company?

A. Yes, sir.

Q. Whom did you see?

A. Well, I first met Mr. Jensen, Hyrum, and the bookkeeper, with whom I am personally acquainted. [402]

Q. What was her name?

A. Mrs. Van Harpin, I believe. After exchang-

(Testimony of Neal A. Jensen.)

ing greetings with them Dee came into the office and we talked for a few minutes, and I told them why I was there and what I wanted. And Mr. Hyrum Jensen told me to go out in the yard and find what I wanted. He said, "You know the stock about as well as I do."

So I did. I went out, found what I wanted, and proceeded to load it into the truck.

Q. Did you see Mr. Hyrum Johnson in the office building there? A. Mr. Hyrum Jensen?

Q. Jensen. I am sorry.

A. Yes, I visited with him there.

Q. While you were loading the truck did you have occasion to see Dee on the outside of the building? A. Yes.

Q. Where did you see Dee on the outside of the building?

A. Well, Dee came from the direction of the office over to where I was loading, across the street, and rather cater-cornering in a direction like this (indicating), and asked me if I was finding what I wanted. I told him I had, and offered to give him the tally, but he told me to keep track of it. He said, "Give it to Mrs. Kellam, the book-keeper in Mr. Hess' office." [403]

Q. Then did you see Dee Jensen any more before you learned of the fire?

A. Well, after Dee talked to me there he went west on Third Avenue and turned up Broadway.

Q. Was he walking?

(Testimony of Neal A. Jensen.)

A. Yes, he was walking at the time. He was going to lunch.

Q. And he was walking at that particular time?

A. Yes.

Q. After he left you did you go ahead and complete loading your lumber? A. Yes.

Q. After you completed your job where did you go?

A. I went over to the Hess Company's office and gave the tally of the lumber I got to Mrs. Kellam, the bookkeeper.

Q. Who was with you in the Hess Company office? A. Mr. Sterling Johnson.

Q. Anybody else?

A. Well, Mrs. Kellam, the lady I was getting the load for and doing some work for, was there; and Mrs. Anna Hess, the owner of the business.

Q. Did anything unusual occur while you were standing there in that office?

A. Yes. I was on the front side of the counter and standing beside me was Sterling Johnson. Mrs. Kellam was over here [404] taking the tally, and Mrs. Hess was standing like that, there (indicating). And an explosion occurred, like, well, you might say dynamite. Probably not quite so sharp. And Mrs. Hess said——

Q. (By The Court): Don't say what was said. Just say what happened. A. Well,——

Q. (By Mr. Castro): Did you look any place after you realized that something had taken place?

A. Yes, I looked out the window just right be-

(Testimony of Neal A. Jensen.)

side me, and there was a volume of smoke coming out of the Eureka Lumber Company's building.

Q. About how big are those windows along the west side of the Hess office through which you were looking?

A. I imagine they are about at least eight or ten feet.

Q. High?

A. Well, they are possibly eight feet high and ten feet wide.

Q. What did you do when you saw that smoke?

A. I said to Mrs. Kellam——

Q. (By The Court): Don't say what you said; just what you did.

A. I ran over to the Eureka Lumber Company's office and tried to get in. [405]

Q. (By Mr. Castro): How close were you to the front door of the Hess office when you saw that smoke?

A. About as far from here to that railing.

Q. Two and a half to three feet?

A. That is right.

Q. When you came out of the front door did you then look in a general westerly direction toward Broadway? A. Yes, I did.

Q. Then what did you do when you got out on the street?

A. Well, I ran across the street and tried to get into the Eureka Company's office.

Q. Did anybody run with you?

A. Mr. Johnson.

(Testimony of Neal A. Jensen.)

Q. Where did you try to enter the office of the Eureka Lumber Company?

A. The front door.

Q. This door which has been marked here with the Roman Numeral "I" has been indicated as the front door of the office. Is that the door you have reference to?

A. That is right.

Q. Were you able to open that door?

A. No; the door was locked.

Q. When you found that door was locked where did you go?

A. I went back to the Hess Company's office.

Q. Then what did you do after you had gone back? Did you make any entry into the shed portion of the building after you found the front door was locked?

A. Yes, I did. We ran back again to the Eureka Lumber Company and ran out into the shed on the side, the warehouse.

Q. You are familiar with the sawmill that was located in that shed?

A. Yes.

Q. And the sawmill area is marked on the diagram, the first door west of the office. Will you point where you entered the shed?

A. Well, the first time over the sawmill was standing pretty well up the front, and I entered about——

The Court: What did he say?

Mr. Castro: He said "the first time over"——

The Court: The other way, is that right?

Q. (By Mr. Castro): Speak a little louder.

(Testimony of Neal A. Jensen.)

A. The first trip over I came over and went in this door, jumping over the front of the sawmill, and went around behind here (indicating). But there was no fire yet in this part of the building.

Q. How far did you go into that shed building at that time?

A. Well, I went around to the back end of the sawmill [407] possibly 40 feet, 30 feet.

Q. Did that give you a view looking toward the railroad track side of the building?

A. Yes.

Q. Was there any fire anywhere in that shed area?

A. Not at that time. There was none on this side of the partition.

Q. You are referring to the dividing partition between the east and west halves of the building?

A. That is right.

Q. Could you see any fire when you got in there?

A. Well, we could see between the cracks in the boards. The boards are uprights, and there was a crack between them, but we could see the fire over here all right (indicating).

Q. The boards you are referring to, are they the boards in the dividing partition?

A. That is right, the boards in the partition.

Q. Will you point out on the diagram where you saw flames beyond that partition?

A. Well, looking through here (indicating) we

(Testimony of Neal A. Jensen.)

could see flames and smoke over here, but exactly, the exact spot they were, I don't think I stopped to look. All I seen was a mass of flames in there.

Q. Would that be in this room which has been described as south—we have referred to this room at the southwest [408] room—is that the room in which you looked?

A. I really think the fire, on the first trip over, was in this room (indicating).

Q. You were looking from the partition here (indicating)?

A. The fire was in this room, next to this partition.

Q. Could you mark about where you looked through?

A. This is as well as I remember. It would be right about there (indicating).

Q. This is the partition dividing the shed?

A. That is right.

Q. Is this the partition that you looked through?

A. That is right.

Q. Will you mark on that partition where you looked through? A. (Witness indicates.)

Q. No. The part of the partition you were looking through. Just put an "X" for the general location. A. Right about there (indicating).

Mr. Castro: May we mark that "J-1," Your Honor?

Q. (By Mr. Castro): From J-1 did you then have a view into this southwest room? Could you see the flames in there?

(Testimony of Neal A. Jensen.)

A. Looking through the cracks we could see flames, yes.

Q. After you saw those flames what did you do?

A. Well, on the first trip, after the first trip we [409] hurried back over to the Hess office to see if they got in contact with the Fire Department.

Q. What did you do after you reached the Hess Company office? A. We ran back again.

Q. And then did you make any other entry into the shed portion? A. Yes.

Q. On your second entry into the shed where did you go?

A. Well, the second entry, we came over to the west door and came into the west—entered here at that time (indicating). By that time the fire had broken through this wall some.

Q. You are indicating the partition dividing the two halves of the building?

A. That is right. And we came and entered this part of the building there on this side (indicating).

Q. Indicating the west door on the Third Street side? A. That is right.

Q. How far did you get into the building?

A. Well, I went back about halfway.

Q. At that time did you see fire coming from any place except up in the partition between the two halves of the building?

A. No. The fire was breaking through here in several [410] different places (indicating). It was

(Testimony of Neal A. Jensen.)

up along the roof and was breaking through down, well, near the floor, all the way through.

Q. When you walked in here (indicating), when you got into that partition which you marked J-1, where you looked through the partition, did you see any stacks of redwood molding?

A. Well, I can't tell you that I could designate what the lumber was. There was a pile of lumber there, but I didn't look for lumber, Mr. Castro. I was in a hurry, excited, I presume, on account of the fire.

Q. Did you have any difficulty in reaching the partition to look through? Could you walk right up to the partition?

A. Not on the second trip over.

Q. Oh, the first trip over, Mr. Jensen?

A. I really didn't try. I ran around and stood in back of the mill, at the back end of the mill, to see what progress the fire was making. Then I turned and ran back to the Hess Company office.

Q. You have been in the lumber business for a period of years, have you? A. Yes, sir.

Q. And you are familiar with what we are talking about when we talked about stacked, as distinguished from piled lumber, are you? [411]

A. Yes.

Q. Did you see any stacks of lumber in the building? A. Stacked lumber?

Q. Yes.

A. That is usually put up in piles, uniformly

(Testimony of Neal A. Jensen.)

stacked. I didn't see that. I did see a pile of lumber back of the sawmill, as I remember it.

Q. Did you see lumber at any other point when you were in there?

A. Truthfully I couldn't tell you that I did or I did not because, as I said, I was excited, and I was interested in the fire, only.

Q. Do you feel that you can give us a fair opinion as to the amount of lumber that you saw in this pile at the end of the sawmill?

A. No, I couldn't do it, I am sure.

Q. Did you remain at the scene of the fire during the entire time that the fire was fought there?

A. Yes, I did.

Mr. Castro: Those are all the questions I have on direct examination, Your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Jensen, when you went back over to the Hess office after your first trip over, did you ascertain whether or not [412] the alarm had been turned in to the fire Department at that time?

A. The alarm—we tried on several occasions to find out if it had go through, and finally, when we went back over the second time we stood there, and during the time we were standing there they got hold of the Fire Department and got the alarm through.

Q. How long had that been after your first trip

(Testimony of Neal A. Jensen.)

over to the lumber company after you discovered the fire?

A. Well, I think it was from six to ten minutes.

Q. And then how long was it after that before the Fire Department showed up?

A. Twenty minutes.

Mr. Hilger: Thank you. That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Jensen, did you take your watch out to check any times?

A. I did. May I say that not only myself, but Mr. Johnson and Miss Kellam checked with me.

Q. Has Mr. Hyrum Jensen asked you to be a witness in this case? A. No, sir.

Mr. Castro: I believe those are all the questions I have, Your Honor. [413]

Mr. Hilger: I have no questions.

The Court: That is all.

(Witness excused.)

The Court: I notice that some of the jurors talk with one another in the jury box. I meant to caution you that there is no objection to your talking to one another, as long as you do not talk about the case, because you are not supposed to discuss the case itself until it is finally submitted to you. But you are at liberty, of course, to talk with one another on anything except the case while you are in the jury box or elsewhere.

Mr. Castro: Your Honor, may I show them Ex-

hibit D, which is a photograph of the Hess buildings?

The Court: All right.

(Whereupon the photograph referred to was handed to the jury.)

HAROLD McBETH

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

Q. (By the Clerk): Please state your name to the Court and to the Jury.

A. My name is Harold McBeth, of Eureka, California.

Direct Examination [414]

Q. (By Mr. Castro): Where do you live, Mr. McBeth?

A. I live at 735 Buhne Street, Eureka, California.

Q. How long have you made your home in the Eureka area? A. Forty-eight years.

Q. You are a married man with family there?

A. Yes, sir.

Q. What is your business or occupation?

A. I am a fireman in the Eureka Fire Department, and I have charge of the Fire Prevention Bureau.

Q. How long have you been in the Eureka Fire Department? A. Fourteen years, sir.

Q. In June of 1956 what, generally, were your duties in the Fire Department?

A. In June of 1956 I was fire—still had charge of the Fire Prevention Bureau.

(Testimony of Harold McBeth.)

Q. Were you familiar with the Eureka Lumber Company Building? A. Yes, sir.

Q. On Third and Commercial Streets?

A. Yes, sir.

Q. Had you been there prior to the fire of June 25, 1956? A. Yes, sir.

Q. Now, do you appear here under a subpoena that was directed to you to appear here?

A. Yes, sir. [415]

Q. Asking you to bring certain records relating to this fire? A. Yes.

Q. And have you brought those records?

A. I have.

Q. Does the Eureka Fire Department have a system of alarms?

A. Yes, sir; the Gamewell System.

Q. How are those alarms recorded at the Department? A. By tape, sir.

Q. Do you have the tape which gave the alarm for the Eureka Lumber Company fire?

A. I do, sir.

Q. Will you produce it at this time?

A. (Witness produces tape.)

Q. Will you show on the tape how you determine the time of recordation?

A. There is a clock on a Gamewell Fire Alarm System that automatically, the minute the alarm comes in, stamps the day, the year, the minute, and the hour.

Q. What was the alarm time on this particular fire?

(Testimony of Harold McBeth.)

A. It is 12:21 p.m., the year 1956, sixth month, and the 25th day.

Mr. Castro: I offer it in evidence as defendant's exhibit next in order. [416]

(Whereupon the tape recording of fire alarm referred to was marked Defendant's Exhibit U in evidence.)

Q. (By the Court): That is some sort of automatic alarm system that you have? It has nothing to do with telephone, has it?

A. No, your Honor, it is the same as a street box out here that you would go to call the fire at.

Q. You pull something down?

A. You pull something down and it records on that in our central fire station.

Q. (By Mr. Castro): Were you at the first station when that alarm was received?

A. No, sir, I was not.

Q. Were you in the City of Eureka at that time?

A. Yes, sir, I was sitting at the lunch table in my home, 738 West Buhne Street.

Q. How far is the Fire Department from this Eureka Lumber Company Building?

A. Approximately five blocks in the way of travel.

Q. Did you go to the scene of the fire after you heard the alarm?

A. I was called to the scene of the fire by the dispatcher of the Eureka Fire Department.

(Testimony of Harold McBeth.)

Q. About what time did you reach the scene of the fire? [417]

A. Oh, I would say approximately 12:35.

Q. Was any of the Fire Department there when you arrived? A. Yes, sir.

Q. What units of the Fire Department were there when you arrived?

A. A thousand-gallon La France pumper. There was a 1,250-gallon Seagrave pumper. There was a 65-foot American La France aerial ladder. And as I was entering the scene of the fire, a 500-gallon Fox pumper was coming up on the scene.

Q. Had lines already been laid when you reached there? A. Yes, sir.

Q. What lines had been laid by the time you reached there?

A. To the best of my knowledge four lines were laid off of the pumper at the corner of Third and Commercial Street. One line was laid off the Seagrave pumper to in front of the Mobiloil Company's plant, which is right opposite Third Street and Broadway. And there was one line laid from the corner of Fourth and Commercial down Commercial Street, across the lot adjacent to the Eureka Lumber Company, and taken off there and carried into the building.

Q. Did you take part in the physical fighting of that fire after you arrived? A. I did, sir.

Q. Did you make any entry into the building?

A. I did. [418]

Q. Where did you make the entry?

(Testimony of Harold McBeth.)

A. Into the back side in the alley adjacent to the spur track.

Q. This diagram that is on the wall, have you seen that diagram?

A. No, this is my first view of it.

Q. The bottom represents Third Street, the right-hand is Commercial, the top represents the railroad tracks. This line to the west represents the shed or open part of the building. The line to the east represents the room or the office section of the building. The doorways are marked "Doors," and have the Roman numerals on them, to which doors were attached. This represents the area where there was a portable sawmill sitting. With that in mind do you think you could indicate where you first made your entry?

A. Yes, sir, if I may have the pointer. I came into this position right back here (indicating). The time I picked up this line there had arrived another thousand-gallon pumper which was hooked up at the corner of Second and Commercial Street. I carried an inch and a half line, and I had better tell the jury we have three sized lines on our equipment in the City of Eureka. We have three-inch hose-lines, we have 2½-inch lines——

The Court: We know you have a pretty good fire department there, but where did you go into the building? That is what we want to know. [419]

The Witness: Right here (indicating).

Q. (By Mr. Castro): That is through Doorway No. III? A. Doorway No. III.

(Testimony of Harold McBeth.)

Q. How did you get into the door? Was it open or was it forced open?

A. It was forced open.

Q. What did you find when you got inside that doorway?

A. A continuous lot of smoke rolling. I had to lie and crawl on my stomach to get at this area over here.

Q. You are indicating the south end of the northeast room? A. Yes.

Q. Was there any fire burning in that room when you made your entry up to that point?

A. No, sir, it was nothing but billowing smoke, thick, and plenty of it.

Q. Did you stay in that room or get out of it?

A. No, I stayed in that room. I came directly over here where there was a ladder.

Q. You are indicating the southwest corner of the room. Where did that ladder go?

A. That ladder went to a loft above this part of the building.

Q. That part of the building, you are pointing to a portion where there was an upstairs office?

A. Yes, storerooms in the back end. [420]

Q. Did you make any entry into that office?

A. I started fighting the fire here and crawled up here.

Q. About midway?

A. About midway. There are two different partitions in the building.

(Testimony of Harold McBeth.)

Q. Did you observe any flames when you got into the office area? A. Yes, sir.

Q. Were those flames put out?

A. Yes, they were.

Q. Could you tell where the fire was coming from as you were fighting it there in that upstairs area?

A. It seemed to be coming right directly across this area, right in here (indicating).

Q. That is indicating from an area which we call the southwest room. Did you go any place else after you were upstairs there?

A. Yes, I kept on working until I met the boys that were coming up from this end.

Q. Indicating coming up——

A. They came up the stairs here, went through a doorway, and we proceeded to put the fire out in front of the building over the front office as it shows here on the second story.

Q. After you put the fire out on the second story where did you go? [421]

A. I went through many parts of the building starting to put out spot fires and conduct what we call a mop-up.

Q. In the back or the northeast corner room was there a loft along that west wall of it right in here?

A. To the best of my knowledge, no.

Q. You may sit down, Mr. McBeth, if you will, for a moment. Did you remove anything from the building while you were there? A. Yes, sir.

Q. Where were you making your removal from?

(Testimony of Harold McBeth.)

A. We were making our removal here. There was—as I remember, there were some toilets, there were some louvered windows, there was paint. I think mastic. What we did in trying to salvage what we could, we started a line right out through the door to the men who were working outside, passed it out in that position there so we could salvage what was good stuff.

Q. Did you see that merchandise being put on anybody's truck later on? A. Yes.

Q. Whose truck was that?

A. I think, if I am not mistaken, it was Dee Jensen's pickup.

Q. Did you take pictures while you were there?

A. Yes, sir, I did.

Q. Is that one of your jobs?

A. Yes, sir. [422]

Q. One of your jobs in the fire department is to take pictures during fires? A. Yes, sir.

Q. Did you take any pictures of the office downstairs? A. Yes, sir.

Q. Do you have those pictures with you?

A. I do. It will be necessary for me to find them.

Q. (By the Court): You did not take those pictures while the fire was going on?

A. No, sir, after.

Q. (By Mr. Castro): Were they taken the same afternoon of the fire?

A. Yes, sir. These two pictures, sir, are of the office upstairs (indicating).

Q. I was asking about the office on the ground floor there. That would be the southwest room.

(Testimony of Harold McBeth.)

A. No, I am sorry, sir. I made a mistake. I did not take a picture of that, I am pretty sure. That is the warehouse exactly behind—that is the sales room, rather, exactly behind the front office.

Q. Will you point out on the diagram the area that is depicted in this photograph?

A. It would be the area right along this wall.

Q. Would you take the red pencil and draw a line along there? [423]

A. There were shelves, I would say, up to about here.

Q. May we mark the south end of that line as M-1 and the north end as M-2. Were those shelves burned?

A. Not too bad, sir. Just partially where the fire fell through this partition here, and to my mind, if I recall it correctly, it was in about three bad positions there.

Q. Does this photograph which you took show the area where the fire burned through?

A. Yes, sir.

Mr. Castro: I would like to offer this photograph in evidence as Defendant's next in order.

Mr. Hilger: Do you mind if I see it, counsel?

Q. Did you observe the condition of the shelves as to whether there was merchandise on them?

A. Yes, sir, there was.

Q. Does this picture fairly depict the quantity of merchandise?

A. To the best of my knowledge, yes.

(Testimony of Harold McBeth.)

Mr. Castro: I offer it in evidence as Defendant's next in order, your Honor.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit V.)

Q. (By Mr. Castro): Were there some shelves in that storeroom shown in that photograph other than the ones you took pictures of? [424]

A. Yes, across over in here.

Q. Indicating along the east area?

A. Yes, sir. If my recollection is right, sir, there were nail bins over here, and then there was a metal shelf down along in this area here.

Q. I show you a photograph taken August 10th, I believe Exhibit P. Does that pretty well show the over-all condition of those shelves when you were there the afternoon of the fire? A. Yes, sir.

Q. Will you look at this photograph taken August 10th. Do you recognize what it depicts?

A. Yes.

Q. Does it show some portion of that storeroom?

A. Yes, sir.

Q. What portion of the storeroom does that photograph show?

A. It shows this wall over here.

Q. Indicating again the east wall? A. Yes.

Q. Was that the type of merchandise that you saw in there on the afternoon of the fire?

A. Yes, sir.

Q. Was that merchandise left intact there up to the time that picture had been taken?

(Testimony of Harold McBeth.)

A. Yes, sir. [425]

Mr. Castro: I offer that photograph in evidence as Defendant's next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit W.)

Q. (By Mr. Castro): Did you take a photograph of any piles of lumber in the shed area on that afternoon? A. Yes, sir.

Q. May I see those photographs?

(The witness handed photographs to counsel.)

Q. Are these photographs that you just handed me photographs of the lumber areas?

A. Yes, sir.

The Court: Shed area, you said.

Mr. Castro: In the shed area, yes, your Honor.

Q. Was there any merchandise in that room that you first entered marked "Northeast"?

A. Yes, sir.

Q. What did it consist of?

A. The main thing that entered into my mind were a stock of doors.

Q. I will show you Defendant's Exhibit F. Does that depict the merchandise which was in there that afternoon? A. Yes, sir.

Q. What area does this photograph depict?

A. The photograph depicts this area from here right straight through—not clear through, I am sorry, sir—about halfway through, right straight through to this front door.

(Testimony of Harold McBeth.)

Q. That is the west wall of that building?

A. Yes, sir.

Q. Does that show the conditions as you saw them immediately after the fire had been put out in that area? A. Yes, sir.

Q. Did you see any indication in that area of redwood molding having been stored along that west wall?

A. Not to the best of my knowledge, no, sir.

Mr. Castro: At this time we will offer that photograph in evidence as Defendant's Exhibit next in evidence.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit X.)

Q. (By Mr. Castro): I will show you another photograph. Where did you take that picture?

A. To the best of my knowledge, right in this corner.

Q. That is indicating the northwest corner of the shed? A. Yes.

Q. Was that the only area where you saw any lumber stacked along that west wall?

A. That is the only part where I found anything along that west wall. [427]

Mr. Castro: I offer that photograph in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit Y.)

Q. (By Mr. Castro): You are familiar with

(Testimony of Harold McBeth.)

vertical grain redwood molding? A. Yes, sir.

Q. Did you find any vertical grain redwood molding along that west wall area?

A. Along the west wall?

Q. Yes. A. No, sir.

Q. Did you also take pictures at the base of the sawmill?

A. Yes, sir, I think I have them here.

Q. Are they included in this group that you gave me?

A. I am afraid so. Right here, sir. Here is also another one.

Q. Is this taken from a view further back?

A. Yes.

Q. Will you point out the area that this view shows?

A. The area would show this right around in here (indicating), the end of the sawmill would sit approximately, oh, right about in here.

Q. Would you mark with the red pencil the area shown by [428] that photograph?

A. Right along in here, up to here about like this. Your lumber was piled in front as shown in the photograph.

Mr. Castro: We will mark that area M-3. I offer that photograph in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit Z.)

The Court: We might as well recess.

Mr. Hilger: May we have the remaining picture introduced?

The Court: The last one is Exhibit Z.

Mr. Castro: I have not offered it yet.

The Court: You have not asked him any questions on that.

Mr. Castro: No, I had not.

The Court: We will start in on that tomorrow morning.

Mr. Hilger: May I look over those pictures before the witness is excused this evening?

The Court: Yes, to save time, you may do that. We will take a recess until ten o'clock tomorrow morning, members of the jury.

(Thereupon an adjournment was taken until 10:00 o'clock a.m., Friday, September 27th, 1957.) [429]

Friday, September 27, 1957—10:00 O'Clock A.M.

The Clerk: Jensen vs. Boston Insurance Company.

Mr. Castro: Ready for the defendant.

Mr. Hilger: Ready for the plaintiff.

Mr. Castro: At the close of the testimony yesterday, your Honor, we had offered in evidence certain photographs, and I would ask permission at this time to display those to the jury.

The Court: Very well.

(The photograph last referred to on the previous day was marked Defendant's Exhibit Z, and Defendant's Exhibits V, W, X, Y and Z were thereupon passed to the jury.)

HAROLD McBETH

having been previously duly sworn, was recalled and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Castro): Mr. McBeth, I believe you had one more photograph of lumber debris which we were just looking at when we recessed yesterday afternoon. I think this was the photograph. What does this view show?

A. Mr. Castro, this shows the view of the diesel engine that runs the portable sawmill. It shows the debris of lumber and also a gallon container that had the odors of diesel in it. That was picked up by myself. [430]

Q. At this time you would be facing toward Third Street when this photograph was taken?

A. Yes.

Mr. Castro: We will offer that photograph in evidence.

(The photograph referred to was received in evidence and marked Defendant's Exhibit AA.)

Q. (By Mr. Castro): How soon after the fire was out did you start taking these pictures?

A. Well, immediately after what we call the mop-up I started to take the pictures, which would be approximately, I would say, in the neighborhood of between 2:30 and 3:00 o'clock.

Q. Had anyone disturbed the debris other than what the firefighters had been doing?

A. Not to the best of my knowledge.

(Testimony of Harold McBeth.)

Q. Was the public excluded from the building at that time?

A. There were a few that needed to be chased out at the time, which happens in all fires.

Q. Reference has been made here to bathtubs in the building at the time of the fire. Did you see any bathtubs in the building at the time of the fire?

A. Yes, sir.

Q. How many bathtubs did you see in the building at the time of the fire?

A. To the best of my knowledge there was only one, in the [431] rear corner of the building.

Q. In what room did you see the bathtub?

A. That would be in the area designated as "Kaiser."

Q. That would be in the room we have marked "Kaiser"?

A. Yes, sir.

Q. And would be in the area of the northeast corner of that room. I show you a photograph. Do you recognize the contents of that photograph?

A. I do.

Q. What area does it show?

A. It shows this area right in here (indicating).

Q. That is the bathtub area that you previously pointed to?

A. Yes, sir.

Q. As to the plumbing fixtures that you saw there, were they new or were they used fixtures in that photograph?

A. I wouldn't like to quote, because to the best of my knowledge they are just in the same conditions that I see them now.

(Testimony of Harold McBeth.)

Mr. Hilger: I will object to further inquiry about this. We do not make any claim for a bathtub.

The Court: What is that?

Mr. Hilger: We make no claim for bathtubs or lavatories. We do not list it.

Mr. Castro: The plaintiff in the case testified that there were bathtubs, toilets, and things of that nature, [432] that were in the building which were destroyed in this fire, and I am therefore showing what was there in the nature of the article.

The Court: If there is no claim, isn't this time-consuming?

Mr. Castro: They are waiving their claim and I want to show the condition.

Mr. Hilger: How can you waive a claim without ever having made it?

The Court: I will sustain the objection. I do not see any point in wasting time on something that is not involved.

Mr. Castro: I ask that the photograph be marked for identification.

(The photograph referred to was thereupon marked Defendant's Exhibit AB for identification.)

Q. (By Mr. Castro): Did you find any toilets other than what was used at the building itself?

Mr. Hilger: Same objection, your Honor.

The Court: No claim made to any bathtubs?

Mr. Hilger: No claim is made for any bathtubs, no claim is made for any toilets.

(Testimony of Harold McBeth.)

The Court: What are we taking up time on that for?

Mr. Castro: The testimony by the plaintiff was that there were such things in the building at the time of the [433] fire. That is why I am offering this testimony.

Mr. Hilger: This witness has already testified he helped remove some of them outside the door, so they were removed.

Mr. Castro: Let the witness testify, Mr. Hilger.

Mr. Hilger: Objected to as immaterial.

The Court: He has already testified that there were some bathtubs.

Mr. Castro: No, he has not.

The Court: Somebody testified that there were bathtubs and they moved them out through the door, and they were taken away in a truck. The plaintiff does not make any claim for them. I will sustain the objection.

Q. (By Mr. Castro): Mr. McBeth, were any bathtubs moved out through the Commercial Street door? A. No, sir.

Q. Mr. McBeth, were any toilets moved out through the Commercial Street door?

A. Yes, sir, there was one new toilet and toilet bowl.

The Court: I have sustained an objection to that, counsel.

Q. (By Mr. Castro): Were there any other toilets moved out?

The Court: I have sustained an objection to this

(Testimony of Harold McBeth.)

line of inquiry. Why waste time on it? We are not concerned [434] with it. There might have been a thousand things there in the place. If they are not involved in the claim against the insurance company, there is no point in going into them.

Q. (By Mr. Castro): Do you recall two electric motors in the building after the fire?

A. Yes, sir.

Q. I show you Exhibit D. Can you identify those materials in that exhibit?

A. Yes, sir, sitting right back here in the corner.

Q. Would you put an X over those motors?

The Court: Well, they are there. This takes up a lot of unnecessary time. They are there. The witness has testified that they are there.

Mr. Castro: The plaintiff denied that they were in that location, your Honor, so I was asking the witness to identify them in the photograph.

Mr. Hilger: The plaintiff has not denied anything. The plaintiff in fact insists the motors were there, your Honor.

Mr. Castro: May we mark them, your Honor, as X-1 on Exhibit D?

The Court: You take a lot of time with this, Mr. Castro. I have already ruled on it. Pass on to something else.

Q. (By Mr. Castro): Mr. McBeth, did you find any redwood molding in the building after the fire?

A. Yes, there were types and pieces of molding. How much [435] I couldn't tell you.

Q. Was that molding located at any particular

(Testimony of Harold McBeth.)

point of the building? A. Yes.

Q. Where was that debris located?

A. Throughout this area adjoining the sawmill and throughout in here (indicating). Some of it was scattered by our men, as it was necessary to turn it over to put the fire out.

Q. Is that some of the material which is shown in the photographs which have just been introduced? A. Yes, sir.

Q. As to the end of the sawmill area?

A. Yes, sir.

Q. Did you find any evidence of redwood molding between the sawmill and the east partition or the dividing partition between the halves of the building?

A. Not to the best of my knowledge.

Q. I will show you a photograph. Do you recognize the contents of that photograph?

A. Yes.

Q. Does that show the area between the sawmill and the partition dividing the two halves of the building? A. It does, sir.

Q. Is that substantially the condition of that area immediately following the fire? [436]

A. Yes, sir.

Q. In the foreground of that picture there is some lumber there. Is that the same lumber you have referred to in your previous testimony as being at the end of the bunker? A. Yes, sir.

Mr. Castro: I offer that photograph in evidence as Defendant's Exhibit next in order.

(Testimony of Harold McBeth.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AC.)

Q. (By Mr. Castro): Following this fire did you have any discussion with Hyrum Jensen concerning the care of the property? A. Yes, sir.

Q. Who was present at that discussion?

A. Captain Ritchie, for one man, myself, and if I am not mistaken there was one police officer.

Q. Where did the discussion take place?

A. As I remember it, in front of the building on Third Street.

Q. That is the scene of the fire?

A. Yes, sir.

Q. Would you state what was said at that time and place?

Mr. Hilger: When was it?

Q. (By Mr. Castro): Tell us approximately when that [437] was with relation to the fire.

A. Well, it was in the afternoon right after the fire before 5:00 p.m. I cannot state the hour.

Q. Will you state what was said at that time and place concerning the care of that building and its contents?

A. Yes, sir. I told Mr. Jensen it would be necessary for him to put a watchman on duty to protect his property.

Q. At any time have you told Mr. Jensen that if he would put up signs to keep people out and to board the doors the insurance company would take over the care of the property? A. No, sir.

(Testimony of Harold McBeth.)

Q. Were you present at any discussion between Mr. McMullin and Hyrum Jensen?

A. Yes, I am positive I was.

Q. At that discussion——

Mr. Hilger: When?

Q. (By Mr. Castro): Approximately when did it take place?

A. Immediately preceding the fire when the adjusters were called in.

Q. (By the Court): You mean after?

A. Yes. I am sorry, sir.

Q. (By Mr. Castro): Where did it take place?

A. If I am not mistaken, it took place in front of the building, too. [438]

Q. That is, the scene of the fire?

A. At the scene of the fire.

Q. In that discussion was there any statement by Mr. McMullin or yourself that McMullin and you would take care of the care of the building?

A. No, sir, not to the best of my knowledge.

The Court: Who was McMullin?

Mr. Castro: He was the adjuster who was assigned from the Eureka office, your Honor, of the adjustment bureau.

Q. (By the Court): You would not have anything to do with taking care of the building, anyhow?

A. No, it wasn't our duty.

Q. But there was a conversation between the adjuster of the insurance company——

A. Yes, sir.

(Testimony of Harold McBeth.)

Q. —and the plaintiff? A. Yes, sir.

Q. (By Mr. Castro): At any time after the fire did you tell Hyrum Jensen that it was all right for him to give away any of the property that was left in the building? A. No, sir.

Q. With reference to Harold Dee Jensen, were you acquainted with him? A. Yes, sir.

Q. Following the fire did you have any conversation with [439] Harold Dee Jensen?

Mr. Hilger: I object to that as being hearsay as regards Hyrum.

Mr. Castro: It is admissible against Harold Dee Jensen, your Honor.

Mr. Hilger: It is not binding on Hyrum, your Honor.

The Court: Unless you lay some foundation I would hold that that is hearsay.

Mr. Castro: As to Harold Dee Jensen?

The Court: As to the plaintiff in the case.

Mr. Castro: The third party defendant is Harold Dee Jensen.

The Court: Unless you lay some foundation for your so-called third party claim, I would hold that it is hearsay.

Mr. Castro: Is that your ruling, then, your Honor?

The Court: That is what I said.

Q. (By Mr. Castro): Following the fire did you have any discussion with Harold Dee Jensen in the presence of Hyrum Jensen?

(Testimony of Harold McBeth.)

A. Yes, I am positive we did, relating to names of——

Q. (By Mr. Hilger): When was this discussion, before we go into what was said?

A. Right after the fire, Mr. Hilger, when we were looking for witnesses.

Q. The same day? [440]

A. The same day.

Mr. Hilger: Thank you.

Q. (By Mr. Castro): Was there any discussion at that time relating to the subject of the time Hyrum Jensen left the building or Harold Dee Jensen left the building? A. Yes, sir.

Q. Would you state what the discussion was as regards that subject?

A. As I recall it, in asking Mr. Hyrum Jensen his time of leaving the building, as near as I can recall the statement, he left with his grandson Stevie and one other young chap and went to lunch at approximately 11:40.

Q. Did Harold Dee Jensen state approximately the time he left the building on that occasion?

A. Yes, he stated within the vicinity of between five minutes to 12:00 and five minutes after 12:00.

Q. Immediately following the fire did you make any investigation to determine the point of origin of this fire? A. Yes, sir.

Q. Is that one of your duties in the Fire Prevention Bureau? A. It is, sir.

Q. Did you make any investigation to determine the cause of the fire at that time? A. Yes, sir.

(Testimony of Harold McBeth.)

Q. Was that one of the reasons you took some of these [441] pictures? A. Yes, sir.

Q. Have you had training in determining the point of origin of a fire? A. I have, sir.

Q. Have you had training in causes of fire?

A. Yes, sir.

Q. And that has extended over a period of how many years? A. Fourteen years, sir.

Q. Do you attend schools and meetings concerning those subjects? A. Yes, sir.

Q. What training do you receive in that regard?

A. We have one yearly course in the southern area at the University of Los Angeles, in the northern area at the University of California at Berkeley in arson and fire investigation procedures.

Q. How long a period do those courses extend?

A. Eight-hour periods for five days.

Q. During the course of each year do you have other instruction?

A. We have quarterly meetings of what is known as the Northern California Division of Fire Prevention Bureaus.

Q. And did you make any investigation to determine where the fire originated in the building?

A. Yes, sir.

The Court: He has already answered that. He said he did.

Q. (By Mr. Castro): What investigation did you make in that respect?

A. Well, in making the investigation you always look——

(Testimony of Harold McBeth.)

Q. (By the Court): That is not the question. What did you do? A. What did I do?

Q. That is right.

A. Is it permissible to point to the area that I started in on?

Q. Yes, that is what he wants to know, what you did.

A. I went into this area here where the deep-seatedness of the burning was, to see if I could find anything that would prove that it was a set fire.

Q. (By Mr. Castro): Will you put an X at that mark. Mark that M-1 on Exhibit A.

At this point, your Honor, I think Exhibit A has only been marked for purposes of identification. I would like to offer it at this time in evidence.

(Defendant's Exhibit A for identification was thereupon received in evidence.)

Q. (By Mr. Castro): What else did you do?

A. I took out pieces of board in this area, dug into the [443] ground underneath the floor in this area, cut out partitions in the floor, I sent pieces to the Criminal Identification Investigation Bureau in Sacramento, who has a laboratory, to determine whether there was particles in there that would cause—add fuel to the fire. I waited for an answer and report back.

Q. What conclusion did you reach as to where the fire originated in the building?

Mr. Hilger: I object to that until we find what he did to find where it originated. Apparently his

(Testimony of Harold McBeth.)

testimony so far was as to cause, what he did to find the cause.

Q. (By Mr. Castro): Did you make any observation of the course of the fire? A. Yes, sir.

Q. How did you make your observation as to the course of the fire?

A. As to the deep-seatedness of the burn in the area adjacent and the way it crawled, the prevailing winds that were in the building at the time.

Mr. Castro: May we mark this room with an SW representing the southwest room, your Honor.

Q. Did you go into the upstairs area of the building to see where the fire had come?

A. Yes, sir.

Q. After doing that did you reach any opinion as to where the fire originated? [444]

A. Yes, sir.

Q. What is your opinion as to where the fire originated?

A. Right in this area here (indicating).

Q. You are indicating in the northern portion of the room marked SW. Would you circle the area that you have reference to?

A. (The witness did as requested.)

Mr. Castro: I will mark that circle M-2.

Q. Would you state the basis of your opinion that the fire originated in that room?

A. Yes.

Q. Will you go ahead and state it?

A. Well, the deep-seatedness of your burn com-

(Testimony of Harold McBeth.)

pletely in this room and the amount of heat that forced it to crawl up into the other room, right up above here, showed the great amount of fire that was in this area here (indicating).

Q. This photograph and Exhibit P show the area where the fire penetrated from the southwest room into the storeroom? A. Yes, sir.

Q. At the point which has been marked H-1. Now, did you take a photograph which indicated the course of the fire towards the east side of the building? A. Yes, sir, I think I have.

Q. May we see that photograph? What does that photograph show?

A. This photograph indicates the stairway that goes up into [445] the upper offices and also the partition between the wall.

Q. Which partition is that? Will you point that partition out? A. Right here (indicating).

Q. That is the partition between the southwest room and the storeroom, and you were facing in what direction when that photograph was taken?

A. I would be standing in this area here taking the picture (indicating).

Q. You were facing in a general easterly direction? A. Yes, sir.

Q. And you were standing at approximately the partition dividing the two halves of the building?

A. Yes, sir.

Mr. Castro: I offer this photograph in evidence at Defendant's Exhibit next in order.

(Testimony of Harold McBeth.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AD.)

Q. (By Mr. Castro): You handed me a second photograph. What area does it show?

A. The area particularly above what is written as "Kaiser" right in here (indicating).

Q. Is that a loft area? A. It is. [446]

Q. And that is over in the room where the Kaiser was located? A. Yes, sir.

Q. In what direction was that view taken?

A. That was taken with me standing in this position.

Q. You were standing——

A. Approximately at the head of the stairs.

Q. And you were facing generally north?

A. Generally north.

Q. Is that a true picture of what you saw that afternoon? A. Yes, sir.

Mr. Castro: I offer in evidence as Defendant's Exhibit next in evidence.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AE.)

Q. (By Mr. Castro): Did you find any burning in the room marked "Northeast"? A. No, sir.

Q. Did you find any burning in the room which we have referred to as "Store" except at the point "H-1"?

A. Only right in this area above the office, the partition underneath the floor.

(Testimony of Harold McBeth.)

Q. Did you find any evidence of burning below the wall on any of the floors? [447] A. No.

Q. Did you find any evidence of burning overhead in the area of the room which I am pointing to which has been referred to as an office of Dee Jensen and a closet? A. Yes, sir.

Q. Where did that fire come from that was in that area?

A. It crawled through, it crawled down from the roof and the stairway back like that between partitions of the ceiling.

Q. Was this room which was marked SW completely burned in the sense that the walls and the roof and the ceiling area in there was burned?

A. Yes, sir.

Q. Was there any evidence to indicate that the fire had progressed overhead from the room SW at the south end of that room over the top of the office?

A. Yes, crawled back, back over into this area here, crawled through and underneath the partition which was made, if I am not mistaken, of two-by-eights.

Q. Do you have any photograph of that particular area that we have been referring to as the overhead in the office? A. I have three, sir.

Q. What room do they show that overhead?

A. That shows the office, or the overhead of the office, plasterboard dropping down.

Q. That is the upstairs office? [448]

A. Yes, sir.

(Testimony of Harold McBeth.)

Mr. Castro: I offer it in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AF.)

The Witness: This shows the walls of the office.

Q. (By Mr. Castro): That is the same office?

A. That is the same office.

Mr. Castro: I ask that it be made an exhibit.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AG.)

The Witness: This shows the partitions adjacent over here to the office upstairs.

Q. (By Mr. Castro): Facing in a general northerly direction? A. Yes, sir.

Mr. Castro: I offer it as Defendant's next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AH.)

Q. (By Mr. Castro): I show you a photograph taken on August 10, 1956. [449]

The Court: Mr. Castro, I would say that the case at this point has reached the point where there are so many photographs in evidence that it would take a jury weeks to have testimony read back to them to find out what every photograph of these thirty or forty odd photographs that have been offered in evidence here cover, and many of them are duplicated. I think the case could have been cov-

(Testimony of Harold McBeth.)

ered by just a few photographs that are important. However, you can cover as many as you want. I will give the best instructions I can to the jury at the time the matter goes to them on the subject.

Mr. Castro: This is the only photograph of the area of the closet and downstairs office.

The Court: It may be the only photograph, but the question is the materiality of all the photographs, there being so many of them.

Mr. Castro: We will offer it in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AI.)

Q. (By Mr. Castro): In the debris which you found at the end of the bunker and in the wall area did you find any containers in that debris?

A. Yes, sir.

Q. What container did you find in that debris?

A. I found a gallon can.

Q. Was that an open-top can?

A. An open-top can.

Q. Was that found on top of the debris or was it down in the debris?

A. It was on top of the debris.

The Court: AA I think is the one you are looking for.

Q. (Mr. Castro): You took a specific photograph on that question, did you?

The Court: You offered a photograph in evi-

(Testimony of Harold McBeth.)

dence that showed the diesel engine with a can there. That was AA.

Mr. Castro: That was another photograph.

The Court: I thought that is what he was referring to.

Q. (By Mr. Castro): Will you designate on the diagram the approximate location of the can that you found at the end of the bunker?

A. I would say right in this area here (indicating). This is supposed to be the sawmill. The diesel engine sticks out here. Right in that area here (indicating).

Q. Is that the can which is shown in Exhibit AA? That is one of them? A. Yes.

Q. Did you find another can in the debris at the end of the [451] bunker? A. Yes, sir.

Q. Did you take a photograph of that can in position? A. Yes, sir.

Q. Will you mark the general location of that can?

A. On the opposite side of the diesel engine that sticks out from the sawmill.

Q. Is this the photograph that you took of that can in position? A. It is, sir.

Mr. Castro: I offer it in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AJ.)

Q. (By Mr. Castro): Did that can contain anything?

(Testimony of Harold McBeth.)

A. Yes, it contained a rag and odors of diesel fuel in it.

Q. Was that an open-top can?

A. It was, sir.

Q. Did you find any container of fuel in the room marked "Kaiser"? A. Yes, sir.

Q. What did you find in the room marked "Kaiser"?

A. I found a two-gallon can along the partition of the wall, approximately in this area here. [452]

Q. Will you put an X there. I will mark that M-4. Put an X in the position in which you found the one-gallon can with the rag in it at the end of the bunker.

A. Right there (indicating).

Q. I will mark that with a circle M-5, and the one-gallon can that you said you found in the area of the diesel——

A. If you designate that as the sawmill motor that sticks out, it was right in here.

Q. We will mark that M-6. Was the container that you found in the Kaiser room, the two-gallon container at M-4, was it open or closed?

A. It was closed.

Q. Did you find or did you look at the gas tank of the Kaiser automobile? A. Yes, sir.

Q. Was the cap on or off the gas tank?

A. The cap was off.

Q. Did you find any containers in the room SW?

A. Yes, sir.

(Testimony of Harold McBeth.)

Q. What containers did you find in the room SW?

A. One 50-gallon drum with gasoline in it and with a pump in it.

Q. Was the pump tightly affixed or had it been loosened? A. It was loosely.

Q. Did you find a five-gallon container any place in the [453] building? A. Yes, sir.

Q. Where did you find the five-gallon container?

A. In the area here (indicating).

Q. Will you mark an X there? Designate that as M-7, representing the five-gallon container. Was it open or closed? A. It was open.

Q. What did it contain?

A. It had odors of diesel fuel in it.

Q. Did you find any other containers in the building with fuel, inflammable fuels with relation to the areas we have been talking about?

A. Yes, sir. There was a workbench in the area in here that had an open-top, five-gallon can in this area, right in here, adjacent to the bench.

Q. Will you mark that with an X. Would you designate where you found this 50-gallon can?

A. (Witness indicating.)

Q. M-9. Did you find any other can or container with inflammables in the building?

A. Yes, sir.

The Court: Counsel, I do not want to be critical, but this is taking an inordinate amount of time. You could ask one question of the witness, "Tell us the cans you found," and he could answer it in one

(Testimony of Harold McBeth.)

question and answer, but you go on [454] each one separately and that is time-consuming. Can't you do it all in one question? I could do it.

Mr. Castro: I would just ask the witness how many cans did you find there and where are they located.

The Court: And he can answer it all at one time.

Q. (By Mr. Castro): If you found any other cans, will you designate each of the other cans that you found?

A. There were cans of mastic, which is inflammable, on the floor here (indicating).

Q. Would you mark an X there, please, and put an M-10 over it?

A. There were a few inflammables of paint over in this area on the shelves and on the steel stands that were in here.

Q. You are indicating in the store part?

A. In the store, yes. There were some piled along the shelving here, and others on steel stands that were in this area here.

Q. Did you find anything with regard to the containers in the storeroom which would indicate to you that they had contributed to the fire?

Mr. Hilger: I will object to that as leading and suggestive. Just ask what he found out about the cans.

The Court: I think we can use our common sense. If you have a fire, and the fire starts going, and there is some inflammable material in it, the inflammable material is [455] going to burn.

(Testimony of Harold McBeth.)

Mr. Castro: That is just the point, in that location.

The Court: It does not take a Philadelphia lawyer to decide that. He has stated there was a quantity of paint and inflammable oils and some gasoline and some oil on the premises at the time.

Q. (By Mr. Castro): Were the paint containers burned up in the storeroom?

A. No, they were not.

Q. Were the other inflammable things in the storeroom burned up?

A. Not all of them, no.

Q. Will you go ahead and designate anything else you wish in relation to inflammables?

A. Well, there was a considerable amount of oil—well, let's say inflammables—that could add fuel to the fire in the area they had been working.

Q. (By the Court): What do you mean by that? Do you mean it was in cans?

A. No, your Honor, it would be through working conditions, running the sawmill and greasing.

Mr. Hilger: Grease and dirt.

Q. (By the Court): Greasing material?

A. Yes, sir. [456]

Q. There is nothing unusual about that, is there?

A. No, sir.

The Court: Why do you take up time on that, then?

Q. (By Mr. Castro): Have you designated each of the items that you deemed unusual in finding out the cause of the fire?

(Testimony of Harold McBeth.)

A. With the exception that I failed to point out one other 50-gallon drum which sat adjacent to the motor of the sawmill.

Q. Are there any other items that you felt had any significance in this fire with regard to inflammables?

The Court: So that I understand what he is talking about, there was merchandise and oil in there, in this building, that was of an inflammable nature. It was part of the stock in trade.

Q. Isn't that right? A. Right, sir.

The Court: Why do we have to take up time on that? There is nothing wrong about a man——

Mr. Castro: We except to the remarks of the Court in that regard.

The Court: I am just trying to save time. It is taking an inordinate long time to bring out. What apparently you want to bring out is the witness' opinion as to the cause of the fire. Now, why don't you ask him that?

Q. (By Mr. Castro): Will you state your opinion as to [457] the cause of the fire?

A. No, I cannot.

Q. Did you form any opinion at all as to whether the inflammables took part in the origin of the fire?

Mr. Hilger: I object to that. He has already answered he hasn't got an opinion.

The Court: Sustained.

Q. (By Mr. Castro): Did you find any indication in the room marked SW as to whether the

(Testimony of Harold McBeth.)

flammables had been placed on the floor of that room?

Mr. Hilger: I object to that as having been asked and answered and covered.

The Court: He has already testified as to where he saw the various cans of material that was inflammable in the place. I think it has been answered. I will sustain the objection.

Q. (By Mr. Castro): Did you find any indication in the room marked SW of inflammables that were not in containers?

Mr. Hilger: I object to that. He has testified fully as to all the inflammables. By "inflammable" what do you mean, counsel? A piece of wood will burn.

The Court: I will sustain the objection on the ground it is cross-examination of his own witness. The witness has already testified that he has no opinion as to the cause of the fire. [458]

Mr. Castro: I am not asking him as to his opinion as to the cause of the fire, your Honor. I am asking him the question as to whether he found any indication of inflammable fluids on the floor of the room marked "Southwest" which were not in containers.

Mr. Hilger: I am going to object to that as being too indefinite. What is an inflammable? It can be a piece of wood. It can be anything. If it is liquid and not in a container, then it is going to run all over everything and be burned up in the

(Testimony of Harold McBeth.)

fire. What do you mean by an inflammable, counsel?

The Court: I have sustained the objection. I do it on the ground that there has to be an end to an examination at some time. I grant counsel have great leeway and all that, but in view of the witness' testimony that he has no opinion as to the cause of the fire, I think a detailed examination unduly prolongs the matter.

Q. (By Mr. Castro): In the room marked "Southwest" did you find any heating units in that room?

Mr. Hilger: Any what?

Mr. Castro: Heating units.

A. Heating?

Q. Yes. A. No.

Q. Like stoves, heaters, or anything of that kind. [459] A. No, sir.

Q. Did you find any gas lines, natural gas, butane gas, or any other types of gas lines entering the room marked "Southwest"? A. No, sir.

Q. Did you find any indication in the room marked "Southwest" that there was burning right on the floor of the room? A. Yes, sir.

Q. In what area did you find the floor of the room burned? A. In this area right here.

Q. Will you mark that area with a red pencil? Will you also mark it M-11? Did you form any opinion as to the cause of that burning on the floor there? A. Yes, sir.

Q. What was your opinion?

(Testimony of Harold McBeth.)

A. There must have been fuel added to it on account of its burning deeply underneath, more so than on top.

Q. What type of fuel?

A. It should have been a fuel of inflammable nature.

Q. Ordinarily does the floor of a room burn in a fire of this nature?

Mr. Hilger: I am objecting to that as being entirely too indefinite about what ordinarily would happen. If he wants to know what happened in this case——

Mr. Castro: I will withdraw the question.

Q. What is there about that type burning that indicates to [460] you——

Mr. Hilger: I will object to that as leading and suggestive. Ask him what it indicates to him.

Mr. Castro: If you want to ask the question, I will ask it that way.

Mr. Hilger: "What does that indicate to you?"

The Court: He did not finish his question.

Mr. Hilger: If he had been allowed to finish it, the damage would have been done. He would have led and suggested.

The Court: I think this witness can take care of himself.

Q. (By Mr. Castro): What was the significance of the burning that you saw in the floor of that area M-11?

A. I took sawed pieces of boards out of the flooring and also the sill, out of here and under-

(Testimony of Harold McBeth.)

neath. After cutting this out, all the deep-seatedness of the burn which, in testing a fire, the deep-seatedness of a burn, we use the point of a knife, and all of it seemed to be on the underneath area instead of on the top.

Q. Did you reach any conclusions as to how it happened to burn in that manner there?

A. It would have had to have some type of fuel added to it to burn that deeply in that area.

The Court: If there were fuel spilled on the floor that would cause it, wouldn't it? [461]

A. Not necessarily, your Honor, not on top. It would burn on top, consume the fuel on top, and then what was underneath, the first fire would take off on top, namely, and consume the fuel; but the other had gone down through the floor, run around, soaked in there, and would cause excessive burning.

Q. You mean the under side of the floor?

A. Yes, sir.

Q. Was that the ceiling of the room below?

A. No, the ground floor.

Q. You are talking about the ground floor?

A. The ground floor.

Q. What was under the ground floor?

A. Dirt—dirt and two-by-twelve—there is a floor made of two-by-eight, two-by-tens, two-by-sixes, two-by-twelves put on six-by—

Q. Is there room for someone to get between the floor and the dirt? A. Not very well.

Q. Assuming that someone put some liquid there, how would they do that?

(Testimony of Harold McBeth.)

A. Well, they would watch in the areas where there were cracks in the floor and pour it through the cracks of the floor.

Q. Some of it would get on the top as well, wouldn't it?

A. Yes, but in the area where it is on top, it would have a faster chance to evaporate and burn faster, because it is a [462] proper mixture. It is like your automobile. There is a point in here, if necessary, if you don't have the proper mixture in running your automobile, your car won't run right. It is the same case.

Q. It would take an extraordinary mind, wouldn't it, to figure out if you poured some inflammable liquid down through a crack in the floor——

Mr. Castro: I do not think it would take any extraordinary mind to figure that out. All they have to do is pour it on top of the floor.

The Court: That prompted my question. If it was poured on top of the floor, the top would burn, too.

Mr. Castro: Yes, it would, but it didn't burn as deep as it did underneath.

The Court: All right. Go ahead.

Mr. Castro: I believe those are all the questions I have on direct examination.

Mr. Hilger: May I have Exhibit X through about AJ or something.

Cross Examination

Q. (By Mr. Hilger): Is that a true picture of

(Testimony of Harold McBeth.)

the north end of the building right after the fire (handing photograph to witness)?

A. Yes, sir.

Mr. Hilger: I introduce that as Plaintiff's next [463] in order.

(The photograph referred to was thereupon marked Plaintiff's Exhibit 21.)

Q. (By Mr. Hilger): Referring to Defendant's Exhibit Z—— A. Yes, sir.

Q. That is lumber, molding, and ashes from same located in the west part of the building?

A. Yes, sir.

Q. Defendant's Y—that likewise is lumber and ashes from lumber on the west side of the building?

A. Which corner, sir?

Q. In the west half of the building.

A. In the west half of the building?

Q. Yes. A. Yes.

Q. Defendant's X—that is the west wall of the building, isn't it?

A. Yes, sir, facing Third Street.

Q. That shows the southwest wall, or does it not? A. Of that front door.

Q. It does not show this portion here, does it?

A. No, sir.

Q. Except partially in the foreground?

A. Partially in the foreground. [464]

Q. Where you observe the stickers in the ashes?

A. Yes, sir.

Q. I show you Defendant's Exhibit AC. That is more lumber and redwood in the west portion

(Testimony of Harold McBeth.)

of the building, looking south from the north part of the building towards the sawmill?

A. Yes, with the exception of this, Mr. Hilger, which fell down from the roof.

Q. Yes, sir.

Mr. Hilger: May I show Exhibit 21 to the jury at this time, your Honor? Pardon me one moment before I do.

Q. That is lumber lying on the ground there throughout the doorway area, isn't it, leading into the building? A. This is not lumber.

Q. I did not ask you about that.

A. No, but I want to make my statement proper.

Q. I asked you if that was lumber there.

A. Part of that is lumber and part of it doors.

Q. And that is lumber that you can see leading back into the building there, isn't it? It appears to be. A. It appears to be, yes.

Q. I show you Defendant's AG. That is the upstairs office, isn't it? A. Yes, sir.

Q. As it appeared right after the fire?

A. Yes, sir. [465]

Q. Perhaps you could help me find the downstairs office, about the last one produced, Defendant's AI. That is this corner office down here, is it not, on the downstairs? A. Yes.

Q. And the identification tag was put on the bottom right of the picture. Now, then, Mr. McBeth, the prevailing wind on that day was blowing from this direction, wasn't it?

A. The northwest, yes.

(Testimony of Harold McBeth.)

Q. That was the northwest and it was blowing towards this way (indicating). A. Yes.

Q. It would be natural for the fire to be traveling in the direction the wind was traveling, correct?

A. Correct.

Q. And it would be natural for it to be traveling in this direction? A. Yes.

Q. The roof over this area was not burned off, was it? A. Over this area?

Q. Over this area. It did not fall in and collapse as it did over this area?

A. I think you will find, sir, in one of the photographs the area over the top of this is down.

Q. And the entire area over here is down, isn't it? A. No, I don't think so. [466]

Q. Let us look at some pictures. Where are the plaintiff's color photos? Mr. McBeth, you recognize this picture? I am showing you Plaintiff's Exhibit 14. I think that was taken standing over here in probably the southwest corner looking northeast toward the part that is behind the partition. Do you have yourself oriented to that?

A. There is the partition, yes.

Q. You will observe the roof is partially gone, but the lumbers thereof are still in place over the partitioned area. A. Yes.

Q. And you will observe even the roof lumbers are collapsed over this entire area here.

A. Yes, sir.

Q. Do you observe that? A. Yes, sir.

(Testimony of Harold McBeth.)

Q. The heat of the fire would follow the direction of the wind ordinarily, wouldn't it?

A. Yes.

Q. You would ordinarily expect the greatest heat to be on this side? A. Yes, sir.

Q. In fact, it was so hot your men couldn't get in here. They had to come around over to make their entrance? A. No, sir.

Q. Do you think the first hoses came through here (indicating)? [467] A. No, sir.

Q. Were you there when the first hoses went through?

A. No, but in talking to our men——

Q. I don't want to know what you talked to your men about. I want to know if there were not three or four hoses taken in through a hole that they kicked in the wall through here.

A. That I couldn't answer, sir.

Q. The greatest heat of the fire went in this direction? A. Yes, sir.

Q. And yet the roof lumbers were not burned over here at the point where they collapsed?

A. That is right.

Q. But these were over here? A. Yes.

Q. You observed a 50-gallon drum of gasoline in this area? A. Yes, sir.

Q. And that had gasoline in it after the fire, didn't it? A. Yes, sir.

Q. It did not burn? A. Yes, it did.

Q. It did not burn?

A. It did burn. Not completely, though.

(Testimony of Harold McBeth.)

Q. You mean the gasoline just burned partly and quit? A. When it was extinguished.

Q. Do you have a picture of that can?

A. Yes. You took it away from me.

Q. That 50-gallon drum had a top on it, didn't it, and had a pump on it?

A. It had a pump on it.

Q. There was a closed 50-gallon drum; it wasn't sitting there without a top? A. No, sir.

Q. And it had a pump in it?

A. Yes, a little hand pump.

Q. That pump had a hose on it?

A. Not a hose; a spout.

Q. A spout? A. Yes.

Q. And that had gasoline in it after the fire, didn't it? A. And water.

Q. It had gasoline in it, didn't it?

A. Yes, and water combined.

Q. And the gasoline hadn't burned, had it?

A. Some of it had, yes.

Q. Some of it was still there after the fire?

A. I grant you, sir, but still some of it had burned.

Q. You did not put out the fire in that area, did you?

A. I was working in the area, sir.

Q. I thought you crawled on your hands and knees over here. [469]

A. Mr. Hilger, you must remember I am all through there. It is necessary for me to go every place.

(Testimony of Harold McBeth.)

Q. I thought that was the hottest part of the fire, Mr. McBeth. A. It was.

Q. So it did not burn the gasoline in that drum?

Mr. Castro: The question has been asked and answered.

The Court: Yes, it has.

Q. (By Mr. Hilger): You say you found a rag in a can over in this direction. A. Yes, sir.

Q. And the rag was not burned?

A. Yes, it was.

Q. You meant you found the remains of a rag?

A. The remains of a rag.

Q. Was that in the can? A. Yes, sir.

Mr. Hilger: I think that is all.

Redirect Examination

Q. (By Mr. Castro): Mr. McBeth, I show you a photograph taken on August 10th. Does that show any portion of the roof of this building?

A. Yes, sir.

Q. What portion of the roof does that show?

A. It shows the west side and the center of the building.

Q. Does that show the roof extending right over the center partition between the two halves of the building? A. Approximately, yes.

Q. Does that show the area where the roof came through? A. Yes, sir.

Q. Is that the only area in which the roofing came through the roof as shown in that photograph?

(Testimony of Harold McBeth.)

A. Yes, to the best of my knowledge, it is.

Mr. Castro: I offer that photograph in evidence.

Mr. Hilger: May I see it first, counsel? Pretty poor photograph, but I don't suppose it is objectionable.

Mr. Castro: Let the jury decide whether it is a poor photograph.

(The photograph referred to was received in evidence and marked Defendant's Exhibit AK and passed to the jury.)

Q. (By Mr. Castro): I show you a photograph taken August 10th, 1956. What portion of the roof does that show?

A. That shows the east side, the center of the building towards the front of the office.

Q. Referring to the section to which I am now pointing on the diagram, was that the condition of the oil following the fire? A. Yes, sir. [471]

Mr. Castro: I offer it as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AL and passed to the jury.)

Q. (By Mr. Castro): Since the fire has some of this roof fallen in?

A. Yes, sir, due to windy conditions.

Q. Do you know when the colored photographs were taken that were shown you?

A. The colored ones?

Q. Were you shown them?

Mr. Hilger: I think it was Plaintiff's 14.

(Testimony of Harold McBeth.)

Q. (By Mr. Castro): Was this after the fire and after the wind had blown part of the roof down?

Mr. Hilger: I object to that. He has not stated.

A. That was not directly after the fire, no, sir.

Mr. Castro: May we have the date when these colored photographs were taken, counsel?

Mr. Hilger. Yes. They were taken in August.

Mr. Castro: What year?

Mr. Hilger: 1956, shortly after the proof of loss was filed.

Mr. Castro: Who was the photographer?

Mr. Hilger: David Hoppe of the Eureka newspapers. [472] They were printed in Portland three or four weeks prior to the trial.

Q. (By Mr. Castro): Reference was made to a photo of the upstairs, AG. Does that show the type of a desk in the upstairs office?

A. Yes, it does.

Q. What was on top of that desk when you took the photograph?

A. The only thing I could see was some papers with some burned edges on them.

Q. Was there any debris from the ceiling plasterboard there?

A. Yes, sir, it shows right here in the picture.

Q. Do you know what a ledger book is?

A. Yes, sir.

Q. Was there any evidence of a ledger book on top of that table?

A. To the best of my knowledge there was not.

(Testimony of Harold McBeth.)

Mr. Castro: I believe those are all the questions I have, your Honor.

The Court: Is that all, counsel? I would like to excuse this witness unless you have some more questions.

Mr. Hilger: I would like to look at these two pictures of the upstairs office for a moment.

The Witness: Your Honor, he has some other photos of mine. When he gets through I would like to have them back.

Mr. Hilger: Yes, surely, as soon as I finish here. [473]

Recross Examination

Q. (By Mr. Hilger): Are these all the photos that you took, Mr. McBeth?

A. Yes, sir, they were all that I took.

Q. It seems to me I saw another one of the upstairs office yesterday, two or three shots of that.

A. No, there were two. The other one I think you saw, Mr. Hilger, if you will give me permission, I will point it out, showing the partition in the office. Somebody has it in evidence.

Q. I have in mind the one that shows the desk.

A. To prove the point, that is all the photos I have. I have the small ones.

Q. I don't doubt your word, Mr. McBeth. I just wanted to make sure, because I observed something in one of the photos I saw yesterday.

A. Yes, sir, I remember your observation.

Q. That I don't see here at the moment, con-

(Testimony of Harold McBeth.)

cerning a couple of steel loops that would be in a loose binder.

A. I remember your observation. The same photo there. That is the one you saw outside.

Mr. Hilger: I have no further questions of the witness.

The Court: You may be excused. We will take the morning recess now, members of the jury.

(Recess.) [474]

NAT ALLEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and jury. A. Nat Allen.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Allen? A. In Eureka.

Q. Married man, family there?

A. Yes, sir.

Q. And you have lived in that area about how long? A. About three years.

Q. In June, 1956, were you living in Eureka?

A. In 1956.

Q. That is a year ago last June.

A. Yes, sir.

Q. Were you employed at that time?

A. Yes, sir.

Q. Where were you employed?

A. Employed by the George C. Jacobs Company, Eureka.

(Testimony of Nat Allen.)

Q. You are acquainted with the Eureka Lumber Company building? A. Yes, sir. [475]

Q. Where is the George C. Jacobs Company with relation to that building?

A. Well, it was cater-cornered and over a block, corner to corner, actually.

Q. What type of work did you do?

A. I did the sales on building material, hardware, paint, millwork.

Q. How long have you been in that line of work?

A. Oh, roughly eleven or twelve years.

Q. At the present time what is your employment in the City of Eureka.

A. I am employed by Montgomery Ward as an outside building material man.

Q. Have you had experience with lumber?

A. Yes, sir.

Q. With redwood molding? A. Yes, sir.

Q. Fenceboards? A. Yes, sir.

Q. Do you recall a fire which occurred at the Eureka Lumber Company? A. Yes, sir.

Q. Following that fire were you contacted by a Mr. McMullin of the General Adjustment Bureau in the City of Eureka? A. Yes, sir. [476]

Q. Did he request you to do anything with regards to the building?

A. He asked me to take an inventory of building material in the building.

Q. Did you then proceed to take an inventory of the things in the building? A. Yes, sir. •

Q. Can you give us the date that you took the

(Testimony of Nat Allen.)

inventory? A. I took it on 9/30.

Q. 1956? A. 1956.

The Court: September 30th?

A. Yes, sir.

Q. (By Mr. Castro): Was anybody with you when you took it? A. No, sir.

Q. Did you reduce that inventory to writing?

A. Yes, sir.

Q. Did you put down the quantity of each item that you found? A. Yes, sir.

Q. Did you put down the wholesale price for each item that you found? A. Yes, sir.

Q. Did you recently have handed you a copy of the proof of [477] loss in this case?

A. Yes, sir.

Q. Have you received that proof of loss with regards to the inventory that you took?

A. Yes.

Q. Do you have your written inventory with you? A. Yes, sir.

Q. Do you have a copy of the proof of loss which I gave you? Did your inventory include the portable sawmill which was in the building?

A. No, sir.

Q. Did your inventory include all items which you saw in the building except the portable sawmill? A. Except for the machinery.

Q. Would you indicate what you mean by machinery?

• A. Well, the portable sawmill, and I think there was some other motors and things out in that area.

(Testimony of Nat Allen.)

Q. I am referring to stock in trade.

A. Yes, sir.

Q. Did your inventory include the lumber which you saw inside the shed building? A. Yes, sir.

Q. How ordinarily is molding measured?

A. Generally it is measured by molding inch.

Q. Do you find it measured by board feet? [478]

A. Yes, sir, on the inventory.

Q. How did you make your determination as to the material that you found there in the way of molding?

A. Well, I counted it as accurately as I could, what I saw, what I could actually find in the line of moldings, in the line of lumber.

Q. With reference to molding did you measure it in lineal foot or board feet?

A. I measured it in molding—

The Court: Counsel, may I interrupt to ask you a question for the purpose of expedition?

The inventory which you made was of all the material, all the stock which was in this place, irrespective of whether it was damaged or not, or only the material that was not damaged?

A. I took it all.

Q. You inventoried everything that you saw there that was either damaged or undamaged?

A. Yes, sir.

Q. (By Mr. Castro): What did you find there either damaged or undamaged with relation to red-wood molding? The number of feet first.

(Testimony of Nat Allen.)

A. In lineal feet of molding I found roughly twenty—about 2800 lineal feet.

Q. What does that amount to in board feet?

A. In board feet between seven and eight hundred board feet, [479] if you had it in the form of boards.

Q. The proof of loss calls for approximately 66,000 board feet. That would amount to what in lineal feet?

A. Well, your average moldings will run probably out of one by two or one by three, so converting that to board feet, you would have roughly up to a quarter of a million lineal feet or molding inches.

Q. As against the 2800 that you found in damaged and undamaged material? A. Yes.

Q. Did you find some fenceboard?

A. Yes, sir.

Q. Either damaged or undamaged?

A. Yes, sir.

Q. What amount of board feet did you find of fenceboard damaged or undamaged?

A. I put it down as 600 board feet.

The Court: When you refer to damaged lumber what do you mean? Lumber that was damaged by some way in fire or water but was capable of measurement? A. Yes, sir.

Q. I suppose some of it was burned up.

A. The ends might be burned or charred. You know, it was all jumbled up. I just estimated what

(Testimony of Nat Allen.)

it amounted to as closely as I could, what was actually there. [480]

Q. (By Mr. Castro): Did you find any other types of lumber in the building, in the shed?

A. I found a little bit of V-rustic, which is a panel or pattern, siding pattern, about a hundred board feet of it, and I found some one-by-two which might be called batton strips or something of that nature. There was about a hundred feet of that.

Q. Were you able to identify or measure any other types of boards there? A. No, sir.

Q. So I may understand and the jury may understand, this is what is inside the building as distinguished from the exterior of the building?

A. Yes, sir.

Q. You made no estimate on things outside the building? A. No, sir.

Q. Did you find any plyboard?

A. No, sir.

Q. Did you find any pine molding?

A. Yes, sir.

Q. How much pine molding did you find?

A. The pine molding I found was in the back room with the doors—I haven't run it clear out here—300, 600—about 600 feet, it seems.

Q. That is board feet? [481]

A. Lineal feet.

Q. And in board feet that would be about what?

A. About 150 board feet.

Q. Where did you find that pine molding?

(Testimony of Nat Allen.)

A. In the back room where the doors, windows and drains were stored.

Q. What was the condition of the pine molding as to whether it would be usable or saleable?

A. It was pretty dirty. It had been wet, of course. I suppose you could salvage it and use it for a painted mold, if you wanted to paint it, but it wouldn't be very valuable.

Q. Did you find any roofing squares, plastic asphaltic roofing squares? A. Yes.

Q. Where did you find those?

A. There was some in a small storage room up where the mill was, and there were a few bundles in the front room, if I remember right, which had been used evidently for display.

Q. How was that merchandise packed or shipped?

A. Shingles are packed in bundles. Asphalt shingles are packed in bundles, three bundles to the square, and the shingles are laid together lengthways and then wrapped with a paper and a wire binder which ties them together, holds them together.

Q. Do those asphalt shingles packed in that manner burn up so that you can't find track of them in a fire of this type? [482]

A. I don't see how they could completely burn.

Q. Did you look for the metal wiring that is used to bind them? A. Yes, sir.

Q. Did you find any of that in the areas where

(Testimony of Nat Allen.)

you found the material? A. No, sir.

Q. How many did you find altogether?

A. Of shingles?

Q. Yes, the plastic shingles.

A. There were four squares in the shed and I think there were two or three squares in the window.

Q. The proof of loss called for how many?

A. 200 squares.

Q. With reference to the other items in the proof of loss, did your inventory pretty well agree so far as the quantity of items were concerned?

A. In the store part of it, yes, sir. It was fairly close.

Q. Is there any other respect that your inventory does not agree in quantity other than the ones you have indicated so far?

A. Just small items. I mean I noticed one place they have two packages of a certain water putty, and I had only one or something to that effect. But it didn't amount to much in dollars and cents.

Q. Did you then price out the items which you have? [483] A. Yes, sir.

Q. What prices did you use?

A. Well, I used wholesale or cost prices, as near as possible. Some of the items I couldn't chase down, but I did the best I could.

Q. With reference to a business operated such as the Eureka Lumber Company or Jacobs for whom you were working, does the retailer buy those things at cost prices or wholesale prices?

(Testimony of Nat Allen.)

A. Yes, sir.

Q. What did your prices total?

A. They totaled up——

Mr. Hilger: Are you going to offer this document in evidence? If so, I am going to object to it.

Mr. Castro: I am trying to expedite it, Your Honor.

Mr. Hilger: His inventory would be the best evidence of what it might total.

The Court: Do you want to offer this? Is there any objection to his offering the inventory?

Mr. Hilger: I have no objection.

Mr. Castro: Certainly. I would be glad to offer it, Your Honor. It consists of eight pages.

The Witness: I didn't count them.

Q. (By Mr. Castro): You marked each of your pages? A. Yes.

Q. Will you check through to be sure you have the entire [484] inventory? A. Yes, sir.

Q. Did you total those eight sheets?

A. Yes, sir.

Q. What was the total? A. \$2,420.30.

Mr. Castro: I offer it in evidence as Defendant's Exhibit next in order.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AM.)

Q. (By Mr. Castro): Does that total of \$2,400 include the lumber that you have related as having found there? A. Yes, sir.

(Testimony of Nat Allen.)

Q. Did you find any evidence of any linoleum tile?
A. No, sir.

Q. With reference to the fence boards that you saw there, did you grade those fence boards?

A. Well, the ones that I could see, I could roughly tell a fair grade on them. It is pretty difficult unless you see them, quite a few of them, but I judge the grade to be about a No. 3.

Q. In dollars and cents what does that mean?

A. Well, No. 3 redwood lumber, which I assume was green, would probably have a value at that time of between, oh, \$60 and \$80 a thousand. [485]

Q. In going through the inventory did you note any items where retail prices were charged rather than wholesale prices?
A. Yes, I noted a few.

Q. Would you read those items off, please?

A. Well, foundation bolts, for instance, were put in at 15 cents each. There were 250 of them. I think I had 230 or something. That is a retail price.

Q. What is the wholesale price?

A. Wholesale was seven or eight, depending on how you buy them.

Q. That is cents?

A. Yes, sir. Pabco roof coating put in at \$1.10 a gallon. That is approximately a good retail price for it. It generally costs around 75, 74.

There was a vent and wall window put in a double unit, put in at \$54. I imagine most manufacturers furnish those at approximately cost to get them on the floor. I imagine it should cost around \$20, \$25.

(Testimony of Nat Allen.)

There was a four-foot metal kitchen cabinet in a sink in for \$145. It could cost—normally it shouldn't be that much. That is the retail price. Most of them retail for around \$100 to \$110 now. So even assuming the higher price it is still too high.

Q. What was the wholesale price, approximately?

A. I would say about \$80 or \$90. [486]

Q. Is there any other item that you noted there?

A. I didn't dig through to get them all one after another, but those are the main ones I noticed.

Q. Did you note an item there, a double sink?

A. I didn't run across that particularly. You aren't referring to that four-foot metal cabinet sink, are you?

Q. I believe there was a price of \$51.

A. Yes, double sink. Yes, you have it for \$45. That is practically a retail price. It should be around not more than thirty.

Q. Does that pretty well cover the items in which you found retail prices? A. Yes, sir.

Mr. Castro: I believe those are all the questions I have on direct examination, Your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Allen, your inventory includes only the items which you were capable of identifying at the time you took your inventory, is that correct? A. Yes.

Q. Anything that would have been consumed by the fire or pushed around and broken up into bits

(Testimony of Nat Allen.)

and pieces prior to your arrival, of course, you did not count? A. No, sir.

Q. Your inventory did not cover the welder, did it? [487] A. No, sir.

Q. It did not cover the electric motor, did it?

A. No, sir.

Q. Or either of them so far as that goes?

A. No, sir.

Q. Nor did it include the portable chainsaw?

A. No.

Q. Or planer heads or knives? A. No.

Q. Nor did it include the portable sawmill?

A. No, sir.

Mr. Hilger: I think that is all. Thank you.

The Court: Is that all, counsel?

Mr. Castro: Just one question.

Redirect Examination

Q. (By Mr. Castro): On the list of items which were on the proof of loss under items called plumbing, such as ells, and things of that kind——

A. Yes, sir.

Q. Were those in a usable condition?

A. Yes, they could be used. They would not be worth their full value. There were spots of rust and things like that.

Q. They had not been taken care of at the time you saw them on September 30th?

A. No, sir. [488]

Mr. Castro: Those are all the questions I have.

The Court: Do you have another witness?

Mr. Castro: I had two more scheduled for this morning. They were planning to come by Southwest Airlines. They are not here. They should have gotten in here by quarter to ten.

The Court: They are probably delayed. You have just two more witnesses?

Mr. Castro: I have three local witnesses that I can put on after lunch. They are short witnesses. I have four of them that I can put on after lunch.

The Court: We had better recess then until two o'clock.

It seems fairly obvious we can complete the testimony this afternoon.

Mr. Castro: I have only one witness who cannot be available until Monday morning and who will take possibly fifteen minutes.

The Court: Maybe you might cover that by stipulation possibly.

Mr. Castro: It is in relation to these two motors.

Mr. Hilger: You mean the value?

Mr. Castro: No, that they were owned by Hill & Morton.

The Court: I do not force this on anyone, but why [489] don't you discuss that with counsel? If we complete the evidence today, then on Monday we can start with the argument.

(Thereupon an adjournment was taken until
2:00 o'clock p.m.) [489-A]

Afternoon Session—2:00 O'clock P.M.

JOHN R. DRISCOLL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. My name is John R. Driscoll, Jr.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Driscoll?

A. At 916 Union Street, Alameda.

Q. Are you employed by anyone?

A. I am employed by Simpson Redwood Company, 235 Montgomery Street, San Francisco.

Q. In what capacity are you employed?

A. I am regional sales supervisor in the eleven western States.

Q. And do you appear here today as a result of a subpoena being directed to your employer?

A. That is correct.

Q. And that subpoena requested you to produce certain records today?

A. That is correct.

Q. Have you brought those records with you?

A. I have. [490]

Q. May we see them at this time, please. What records have you brought with you?

A. I brought invoices of sales of lumber sold to Hill & Morton, Incorporated, and shipped to Eureka Lumber Company from August 1, 1955, to June 25, 1956, including shipments reflected in in-

(Testimony of John R. Driscoll.)

voices 8741, 9429, 9931, 10693, 10805, 11039, 11064, 12327, 12261, 13018, 13129, which invoices were recorded in the subpoena.

Q. Is the Simpson Lumber Company a successor in interest of the Eureka Redwood Lumber Company?

A. The Simpson Redwood Company acquired the properties of the M. & M. Woodworking Company, which included the Eureka Redwood Lumber Company.

Q. Did you find amongst the sales records any record showing a direct sale from Eureka Redwood Company to the Eureka Lumber Company?

A. I have not perused the invoices, merely brought them here, but at a glance and for your information it might indicate that our invoices were directed to Hill & Morton, Incorporated, and show the Eureka Lumber Company at Eureka, California.

Q. In those invoices which invoices cover redwood molding?

A. It is not indicated at a fast glance or at the invoices that this redwood lumber was shipped as redwood molding. However, redwood lumber, either rough or surfaced, may be purchased as molding stock. We did not invoice it, just glancing through here, as molding stock. [491]

Q. Did you find any reference in your records to a shipment or shipments of kiln-dried molding stock to the Eureka Lumber Company?

A. I will have to glance through these very

(Testimony of John R. Driscoll.)

briefly. Offhand the first invoices noted here indicate green California redwood. On the other hand, there is the one which states California redwood. It does not indicate whether it is air-dried, air-seasoned or green.

Q. The one indicating California redwood is invoice No. 8741.

A. The one I am looking at is 10693.

Q. Of what date? A. January 9, 1956.

Q. Do you find any other that would indicate to you that there was dried molding shipped?

A. I might say this, with a rapid glance here—these, of course, you can take a double look at—I do not see any that indicates that the stock was dry.

Q. On the invoice for January 9, 1956, how many board feet or lineal feet were involved in that shipment? A. Board footage, 5,696.

Q. Do you have your office copies of those documents? A. Yes, I do.

Q. May we have them at this time?

A. Yes, sir. [492]

Q. When you ship out green redwood does anything have to be done to it to be able to use it for molding stock?

A. Well, that is a moot question. I will answer it this way: When we ship green redwood or other to other manufacturers, or anyone for that matter, it could be run to molding green, it could be run to molding air-seasoned or it could be run to molding

(Testimony of John R. Driscoll.)

air-dried. It is considered to be, the kiln-dried stock, in its ultimate use, is molding. Molding is used as kiln-dried ultimately, but through an error or other practices you could run that lumber to a molding pattern in its green state. However, it is not the general practice.

Q. What is the practice in the redwood industry as to storing, that is, in the northern part of the State, as to whether green redwood is stored inside buildings or outside buildings?

A. It would be difficult to speak for the industry as a whole or including smaller operators, but it is considered to be the judicious approach not to put green stock under cover, because generally kiln-dried stock is kept in sheds for obvious reasons. It won't pick up moisture. However, in some instances air-seasoned stock is kept under cover.

Q. When the stock leaves your shipment yard such as that referred to as green redwood in the invoices, is that air-seasoned stock at that time?

A. I might make this statement to clarify. What would be [493] the practice of the Simpson Redwood Company as of compared to the practice——

Q. No, we are interested only in the redwood which was involved in these particular invoices, Mr. Driscoll.

A. It would be difficult for me to say, because this transpired prior to our acquisition of the Eureka Redwood Lumber Company.

Q. Did you produce photostats with these copies of the invoices? A. I did.

(Testimony of John R. Driscoll.)

Q. Will you let us have the photostats of those invoices?

A. Yes, they are right here (indicating).

Q. On Friday of last week did an accountant by the name of Russell Stearns contact your office concerning these invoices?

A. I believe he did.

Q. Did you give Mr. Russell Stearns photostatic copies of those invoices?

A. I was not involved in the particulars. Another gentleman was. However, I met Mr. Stearns and I personally did not give him any invoices to be photostated, but it was my understanding that they were given to him by another party for that purpose.

Q. Amongst those records did you include—is that a bill of lading or shipping memorandum?

A. Yes, sir, bill of lading—yes.

Q. Do you have those bills of lading or shipping memoranda? [494]

A. It could be. As you know, I didn't do anything but pick up the file indicating the invoices requested, nor was I concerned with the particulars.

The Court: Let us move along, counsel. It has taken fifteen minutes and we haven't gotten anything into the record.

Mr. Castro: We have gotten into the record, Your Honor, there was only 5,696 feet.

The Court: In one shipment.

Mr. Castro: In one shipment in a period of ten months.

(Testimony of John R. Driscoll.)

The Court: Are you offering some documents here?

Mr. Castro: Yes, sir.

The Witness: If you will take a look at these, I think it is indicated "Exception." They are self-explanatory.

Q. (By Mr. Castro): The exception you have indicated being the invoices under date of January 9, 1956? A. Yes.

Mr. Castro: I offer these exhibits in evidence as Defendant's next in order.

The Court: Any objection?

Mr. Hilger: No.

(The documents referred to were thereupon received in evidence and marked Defendant's Exhibit AN.) [495]

Mr. Castro: Those are all the questions I have at this time.

Cross Examination

Q. (By Mr. Hilger): Mr. Driscoll, I direct your attention to invoice No. 23124. That is kiln-dried redwood.

A. That is correct. That is an invoice that was not noted. It happens to be in the file. I just asked our personnel to give you the invoices.

Q. This is one of the invoices—this invoice you were not requested by the defendant to bring in?

A. That is correct.

Q. But it does happen to be there for 9,750 feet of kiln-dried lumber?

(Testimony of John R. Driscoll.)

Mr. Castro: May we have the date, counsel?

Mr. Hilger: 9/6/56.

Mr. Castro: That is three months after the fire.

Mr. Hilger: All right.

Q. Here is an invoice dated 9/3/55, which is quite a bit prior to the fire, calling for 12,500 feet of certified kiln-dried redwood delivered to Eureka Lumber Company. Were you requested by the defendant to bring that invoice?

A. What is the invoice number?

Q. I would say by looking at it ER40117 or A3651.

A. That would be — there might be — bear in mind this all transpired prior to our acquisition, but looking at it [496] factually——

Q. You have no knowledge——

A. No, this all transpired before. I know nothing. I am only here because of my position in the company.

Q. (By the Court): How did that invoice come into your possession?

A. Your Honor, when we acquired the Eureka Redwood Lumber Company.

Q. You got a subpoena from the defendant to bring some invoices? A. That is correct.

Q. And you brought those invoices and some others besides? A. I just asked for the file.

Q. In your file there were other invoices than those that were requested in the subpoena?

A. This particular one——

(Testimony of John R. Driscoll.)

Q. Is that so or not? That is all I am asking.

A. This particular one I am referring to now, Your Honor, is not an invoice. It is an order acknowledgment. It happened to be in the file.

Q. All I am trying to find out is how the documents got there.

A. I don't know. I don't know.

Q. (By Mr. Hilger): It shows on its face "Shipped to Eureka Lumber Company via Byers Truck" on its face, does it not? [497]

A. Of course, that is an order acknowledgment, which is always subject to change.

Q. That is what it shows on its face, however?

A. Correct.

Q. There is nothing in the file to indicate a change, is there?

A. That I couldn't say. I don't know.

Q. Look at the file and see.

A. Well, sir, I only brought along again——

Q. I appreciate your position.

A. I don't know any more about this.

Q. I just want to move it along.

A. I don't know. I can't say anything, because I don't know.

Q. Were you asked to bring invoice No. 1398 dated 4/29/55 calling for 20,714 feet of kiln-dried redwood? A. No, sir.

Q. Were you asked to bring invoice No. 9252 dated 9/13/55 calling for 12,500 feet of kiln-dried redwood? A. No, sir.

(Testimony of John R. Driscoll.)

Q. Were you asked to bring invoice ER3116 dated March 7, 1955, covering 7,500 feet of kiln-dried redwood?

A. That figure is not—I just brought along what is in the subpoena.

Q. Yes or no? [498] A. No.

Q. No. 7560, dated May 5, 1955, calling for 20,112 feet of kiln-dried redwood.

A. Is there a prefix besides this number?

Q. Some, yes; some not. When there is I have been reading it. This happens to be No. 7560. Were you requested to bring that one? A. No.

Q. No. ER3367, dated May 3, 1955, calling for 15,000 feet of kiln-dried redwood. A. No.

Q. No. 6861, dated March 10, 1955, calling for 1,850 feet of kiln-dried redwood. A. No.

Q. No. 6862, dated March 10, 1955, calling for 3,267 feet of kiln-dried redwood. A. No.

Q. Or ER7355, dated July 18, 1955, calling for 2,800 feet of kiln-dried redwood. A. No.

Q. You were not asked to bring along any of those invoices nor have you? A. No.

Q. You were asked to bring along only certain invoices by the defendant. Was that described to you as being all your [499] invoices or just those certain numbers?

A. In the subpoena I don't know. I don't know the legal terminology. We just brought along the invoices requested.

Q. And they were requested specifically by num-

(Testimony of John R. Driscoll.)

ber and not all invoices? A. By number.

Mr. Hilger: Thank you. That is all.

Redirect Examination

Q. (By Mr. Castro): Do you know whether any of these invoices exist that counsel was reading the numbers about? A. No.

Q. May I see the subpoena?

(A document was handed to Mr. Castro.)

Mr. Castro: At this time I would offer the subpoena in evidence.

The Witness: I might add that the word "ER" appears, by reviewing this, as an order rather than an invoice.

Mr. Castro: May the original be made a part of the record, Your Honor?

The Court: It is part of the record. It is on file.

Mr. Castro: May I read it at this time as to what we asked them to bring.

The Court: You can, but what is the point of it? Are you making some complaint that the witness has not brought all you asked him to bring?

Mr. Castro: No, I am just restricting the examination to show what we asked for in the subpoena. May I read it to the jury?

The Court: That is argumentative. I have asked you a question and you have not answered me. Are you making a point that the witness has not brought all of the documents that you asked him to bring? If you do, then I will direct him to go and get the documents, any other documents that you want.

(Testimony of John R. Driscoll.)

Q. (By Mr. Castro): As far as you know have you brought all documents that the subpoena called for? A. Yes, I have.

Q. In that subpoena you were asked to produce all invoices of sales of lumber sold to Hill & Morton, Inc., and shipped to Eureka Lumber Company from August 1, 1955, to June 25, 1956, including certain specific invoices, is that correct?

A. That is correct. Whatever the subpoena reads, that is what we brought.

Q. You have produced all the invoices that you have records of during that period of time?

A. It would be impossible to say that. I don't know.

Q. So far as you know those are all the records that you have? A. I don't know.

Q. Did you furnish this information on these invoices to your representatives in the City of Eureka about a week ago? [501]

A. I might clarify this situation——

The Court: Please answer.

A. No.

Q. (By Mr. Castro): Are you acquainted with Haley Bertain up there? A. Yes, sir.

Q. Did you furnish that information to Haley Bertain? A. No.

Q. Do you know if anybody in your company did? A. Does it have to be yes or no?

The Court: Yes, it does, if you know.

The Witness: I am not sure. I suspect, but I don't know.

(Testimony of John R. Driscoll.)

The Court: Then you don't know?

The Witness: Sure.

Mr. Castro: Those are all the questions I have.

The Court: Any other questions?

Q. (By Mr. Castro): I would ask you this: If there are any other invoices that you have for the calendar year 1955 to June 25, 1956, involving sales of redwood shipped to Eureka Lumber Company, would you produce that for us? When you go back to the office will you check?

A. I will if we have them or if I can. I don't know I can, as we all understand. I will do it if we have them, sure.

The Court: You see, you got a subpoena. [502]

A. Yes.

Q. It told you to bring all the invoices you had including certain ones that were numbered. You brought all those that were numbered?

A. Correct.

Q. And that is all you did bring?

A. Right. There might be other trivia in the file, but I don't know.

The Court: It is up to counsel. If you want to have the witness bring further invoices, I will ask him to return with other invoices.

Mr. Castro: I will make that request, since it has been indicated we made only a limited request.

The Court: No one is criticizing you because you made the request you made, but when you listed certain numbers, I take it the office down

(Testimony of John R. Driscoll.)

there produced only the invoices that you numbered.

The Witness: That is right.

The Court: Maybe they have others, maybe they have not.

The Witness: Correct. The same with me. I don't know.

The Court: He is your witness and you will be bound by his testimony. Do you want him to go back and bring more invoices if he has them? I will direct him to do that if [503] you wish.

Mr. Castro: Will you do that, your Honor?

The Court: Will you do that for us?

A. I will do the best I can. I don't promise it. Don't hold me. There may be some under a rug some place. I don't know. We moved everything to San Francisco.

Q. (By Mr. Hilger): Mr. Driscoll, in an effort to be helpful here, Haley Bertain informs me he has discovered within the last day or so quite a pile of invoices, the numbers of a few of which I read off to you, in the Eureka office. Would you in complying with the direction that you have just received from the Court make inquiry to obtain those invoices as well?

A. Yes. I want to comply with the Court's wishes, but it is so indefinite, I would like to be requested to look for this invoice or that one. Otherwise I might be coming back with sixteen or twenty and missing four.

(Testimony of John R. Driscoll.)

The Court: Counsel on the other side will give you the list of the number of invoices referred to. Then you can make a search of your file in Eureka or wherever they are and get those invoices.

The Witness: Fine. Be glad to. But I think we should have numbers because it would be easier for the gals.

Mr. Hilger: I will provide you with one, Mr. Driscoll. Thank you.

The Court: Is that all of the witness? [504]

Mr. Castro: Yes. May the witness have that list at this time, your Honor, so he can take it with him?

Mr. Hilger: Surely.

The Witness: I would like to ask a fair question, your Honor. How soon do we have to produce them?

The Court: If they are in Eureka, it would be pretty hard to get them here before Monday.

The Witness: A little difficult, but I think most of them should be down here, though we don't know.

Mr. Hilger: I happen to know these are in Eureka. At least I am so informed by Haley Bertain in the last day or two.

The Witness: Your Honor, I would like to make a simple statement to clarify my situation.

The Court: No, you are liable to get us all in trouble. That is all.

MRS. ELLEN VAN HARPEN

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. My name is Mrs. Ellen Van Harpen.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mrs. Van Harpen? [505]

A. I live in Fortuna, California.

Q. You are married and you have a family there? A. That is right.

Q. Do you do some work apart from your home duties? A. Yes, I do.

Q. What type of work do you do?

A. General office work and bookkeeping.

Q. Were you acquainted with Hyrum Jensen and Harold Dee Jensen in the City of Eureka?

A. Yes.

Q. Did you work for the Eureka Lumber Company in the City of Eureka? A. I did.

Q. Over what period of time did you work there?

A. I started there in July of 1955 and I worked through June 23rd or 25th of the following year.

Q. Do you recall the fire occurring at the Eureka Lumber Company building? A. Yes.

Q. Were you still working on the day of the fire? A. Yes, sir.

Q. Have you had any dispute of any kind with either Hyrum Jensen or Harold Dee Jensen?

(Testimony of Mrs. Ellen Van Harpen.)

A. No.

Q. Have there been any unpaid wages or anything of that [506] nature?

A. Well, I have some wages coming yet, yes.

Q. Have you filed any claim with the Department of Labor of the State of California for them?

A. No, I did not.

Q. I only asked that because it will be raised later on. What were your duties there?

A. I did general office work, bookkeeping, and I handled most of the retail sales, the orders that came in.

Q. Where were you located on the premises?

A. Well, in the front of the building. If you were facing the building it would be in the right-hand corner.

Q. This diagram which is here, Exhibit A, this represents Third Street and this represents Commercial Street.

A. Yes.

Q. The black lines represent the divisions between the various offices.

A. Yes, sir.

Q. This door marked with Roman numeral I represents the front door, and this is the step-up area.

A. Yes.

Q. Was your office located in the general area to which I am pointing in the southeast quarter of the building?

A. Yes.

Q. I will show you Exhibit G, which is a photograph of that [507] area. Is that the area of your office?

A. Yes, it was.

Q. What were the books of account of the

(Testimony of Mrs. Ellen Van Harpen.)

Eureka Lumber Company? By that I mean, can you enumerate what they were?

A. General journal, sales journal, accounts receivable ledger, cash receipts and cash disbursements journal. Some of those were in the same book, but they were separate journals.

Q. And did you have a general ledger?

A. Yes.

Q. Where were those records kept at the Eureka Lumber Company?

A. They were kept on an open shelf under the counter in the office.

Q. Is that counter area a shelf area shown in Exhibit G?

A. Well, yes, the top of the counter shows a small part of the shelves.

Q. Were any of those areas burned in the fire?

A. No, they were not burned.

Q. Was one of your duties the posting of those books? A. Yes.

Q. Did you so far as posting was concerned on the day of the fire—how close would you say you had the books posted? Up to what date?

A. I believe that they were completed through the end of May. Usually the month was ended and we posted at the end of [508] the month.

Q. When you purchased redwood molding did you receive sellers' invoices to show that purchase?

A. We received invoices from the people that we purchased it from, yes.

Q. What did you do with those invoices?

A. Well, they were put into a folder in which

(Testimony of Mrs. Ellen Van Harpen.)

we kept all of the accounts payable, loose invoices, until they were paid, and after they were paid they were filed in the file.

Q. What type of file were they filed in after they were paid?

A. There were three drawers of file, the standard office file.

Q. Was that steel file located in the area of your counters that you referred to?

A. Yes, it was right next to my desk.

Q. On the day of the fire were all the ledger books in your office except the accounts receivable book?

A. Yes.

Q. Where was the accounts receivable book?

A. The accounts receivable book was upstairs in Dee's office, Dee Jensen's office.

Q. Had Dee Jensen taken it up on the day of the fire?

A. I believe—I don't remember if it was taken up that day or the day before. I believe Bobby Burton took it up there. [509]

Q. After you learned of the fire did you return to the Eureka Lumber Company that afternoon?

A. Well, yes. I was just a short distance away and I went down there while it was burning.

Q. Did you remain until after the fire was under control and put out?

A. Yes, it was still burning a little bit, but they were going into the building when I left.

Q. Did you see Dee Jensen there during that time?

A. Yes.

Q. Did you have any discussion with Dee Jen-

(Testimony of Mrs. Ellen Van Harpen.)

sen during that occasion relating to the accounts receivable book?

Mr. Hilger: Objection. Hearsay as to Mr. Hyrum Jensen.

The Court: I will sustain the objection at this time.

Mr. Castro: This will be offered, then, for the limited purpose of being evidence against Harold Dee Jensen.

The Court: I will sustain the objection on the same ground that I sustained the other objection. It is hearsay, and until there is some foundation laid for a conversation with Dee Jensen, I will hold that it is not proper at this time.

Q. (By Mr. Castro): You did have a conversation, did you? A. Yes. [510]

Mr. Castro: I am not asking for the conversation, your Honor.

Q. Did you have a conversation with Dee Jensen? A. Yes.

Q. After that conversation with Dee Jensen, did Dee Jensen enter the building?

A. Yes, he did.

Q. And shortly after that did he return to where you were?

A. Yes, he came out on the street where I was standing.

Q. Did he bring anything out with him?

A. Yes.

Q. What was he carrying?

A. He brought the accounts receivable ledger.

(Testimony of Mrs. Ellen Van Harpen.)

Q. Did he show you the accounts receivable ledger? A. Yes, he showed it to me.

Q. What was the condition of the accounts receivable ledger?

A. Well, the covers were blackened and burned some and the edges of the pages were black, scorched.

Q. So far as the inside of the pages were concerned, did you see that condition?

A. Yes, he opened it a little ways so we could look at it, and the edges of the pages were damaged, but not the center or the inner part.

Q. Were you still able to read the contents of the pages which you looked at at that time? [511]

A. Yes.

Q. And did you take over the accounts receivable book from Dee Jensen at that time?

A. No.

Q. What did he do with it after you saw it there?

A. Well, he went over towards his pickup. I don't know.

Q. From that time on have you seen at any place the accounts receivable book? A. No.

Q. After the fire did you have occasion to go into the office to see whether the other books of account were in the office?

A. Yes, I went back once several days later.

Q. How did you happen to go back several days later?

A. Well, I was going to stop and talk to Mr.

(Testimony of Mrs. Ellen Van Harpen.)

Jensen, and I was naturally curious about the damage and the condition of the things I had left in there. They didn't belong to me. I just went in.

Q. Was any inquiry made of you by Mr. Jensen concerning the other ledger books? A. No.

Q. On this occasion that you went back did you see the other ledger books in your office?

A. Yes.

Q. Where did you see the other ledger books?

A. They were on the shelf under the counter where I had left them.

Q. Could you observe their general condition?

A. Well, there was a lot of dirt and burnt pieces of—things that evidently fell from the ceiling that were scattered around, and some water damage, but the books were all in a pile and they didn't seem to be damaged except possibly a little water damage to the covers. I didn't pick them up. I didn't examine them. They were all piled in one pile there.

Q. Those ledger books are large books, are they? Will you generally describe their outward appearance?

A. They are regular heavy folders, post binders, as we call them.

Q. Following the fire did you see these invoices that you had kept in your steel file from people from whom you had purchased the lumber?

A. No, I didn't touch anything. I just walked in, looked, and walked out again. I didn't open the files or anything.

(Testimony of Mrs. Ellen Van Harpen.)

Q. Did you see any indication that the invoice file had been disturbed?

A. No, everything looked as I had left it.

Q. And during the year's period that you worked, approximately one year that you worked there from the time of the fire, do you know whether any physical inventory was ever taken of the—— [513]

A. No, not to my knowledge, there was never any physical inventory.

Q. During the period of working there did you have occasion to go into what we have referred to as the shed area of the building? That would be the building which would be on the Broadway side of the premises.

A. Yes, occasionally I went in there, not often.

Q. What would take you into that section of the building?

A. Well, often there would be phone calls from Mr. Jensen or Dee, or something like that. There were men working there occasionally.

Q. In your past work, Mrs. Van Harpen, have you done work at a mill? Did you and your husband operate a lumber mill?

A. Yes, we did.

Q. Are you familiar with redwood moldings?

A. Yes.

Q. And redwood fenceboard?

A. Yes.

Q. And things of that kind?

A. Yes.

Q. At any time up to the time of the fire, Mrs. Van Harpen, did you see redwood molding, kiln-dried molding of a volume of approximately 66,000

(Testimony of Mrs. Ellen Van Harpen.)

board feet stored in that shed? A. Molding?

Q. Yes. [514] A. No.

Q. Did you see fenceboards in the approximate volume, redwood fenceboards of the approximate volume of 35,000 board feet?

A. No, I didn't see it.

Q. What was the lumber that you had seen in the shed when you went in there?

A. Well, any time I went in there there wasn't any lumber stored in there except some pieces of molding, different patterns, and I am talking about actual molding now — quarter round and different patterns of molding that was piled on the ground there. As I remember, there wasn't any floor in that building, and there were scraps, odds and ends.

Q. At any time did you observe redwood molding stacked from a position between—do you recall the portable sawmill in there? A. Yes.

Q. Between that portable sawmill and the partition dividing the two portions of the building, extending along that partition to within ten to fifteen feet of the rear of the building?

A. What was the question again?

Q. Did you ever see redwood molding stacked there from four feet to nine feet high in those areas? A. No, I did not.

Q. Did you ever see redwood molding stacked in the center [515] area of that shed which is designated by the rectangle between X-5, X-3 and X-4?

A. That is approximately the area of the mold-

(Testimony of Mrs. Ellen Van Harpen.)

ing I was telling you about, but it wasn't stacked; it was in a loose pile.

Q. It was in a loose pile? A. Yes.

Q. Did you see molding in any other part of that shed area? A. No, I did not.

Q. Did you see fenceboard in any part of that shed area? A. No, I did not.

Q. Would you, so far as grade was concerned of this molding that you saw piled there, what type of grade was that?

A. Well, as far as I know molding—I wouldn't really know the grade of it—as far as I know molding is more or less one grade.

Q. Can you tell us approximately how big a pile you saw there?

A. Well, it was scattered around. I don't know. I couldn't say.

Q. During the last month before the fire occurred did you receive any shipments of redwood, kiln-dried redwood molding that were stored in the warehouse?

A. They received shipments at times. To my knowledge they were not put in there. I don't know.

Q. With reference to the day of the fire, who was working [516] that day in the office or store section of the building?

A. I was there and Dee Jensen, the only regular employees that were there. Mr. Jensen was out in the yard. He came in the office on occasions.

Q. Did you go out to lunch that day?

A. Yes.

(Testimony of Mrs. Ellen Van Harpen.)

Q. About what time did you go out to lunch?

A. It was about five minutes past twelve.

Q. Who was there in the office when you left to go out to lunch? A. Dee was there.

Q. Earlier that morning had you had to call Dee from another part of the building?

A. Yes, during the morning a customer came in and I had to ask his advice. I called him from a section that they call the warehouse.

Q. Referring again to the diagram, and to the warehouse area to which I am pointing that has been marked SW and has been marked "Kaiser"—

A. Well, I went into the warehouse section, called, and he came from in back.

Q. When you say in the back—

A. The part you have marked "Kaiser."

Q. And then did he approach you through this doorway? A. Yes. [517]

Q. At that time did you observe any 50-gallon drum in the area? A. No.

Q. When you left for lunch, you stated, about five minutes after twelve— A. Yes.

Q. Where did you go?

A. I went to the Blue Ox Cafe.

Q. That is about how far from this particular location? A. Just one block.

Q. Did you drive over there?

A. Yes, I did.

Q. When did you learn about a fire taking place at this building?

(Testimony of Mrs. Ellen Van Harpen.)

A. I had sat down and had ordered my lunch, and the fire trucks started going by, but I didn't realize where the fire was for a few minutes until someone told me, and then I went out. I had just started to eat my lunch.

Q. About how long—could you give us an estimate of about how long it was between the time you left there and the time you first heard the fire trucks?

A. I would say about ten minutes.

Q. You were familiar with the banking, were you, that was being carried on for the Eureka Lumber Company?

A. Well, yes, I was taking care of the books. I sometimes [518] made the deposits.

Q. Were you familiar with an account which was opened in the name of Harold Dee Jensen?

A. Well, partly so, yes. I had the checkbook in my desk. Sometimes when he wanted me to draw a check he would have me make it out for him.

Q. Was that account used to pay for lumber which had been sold to the Eureka Lumber Company? A. At times it was, yes.

Q. Say within two months' time of the fire, were you able to use the account in the name of Harold Dee Jensen to put money into it on behalf of the Eureka Lumber Company?

The Court: Was she able to use the account? What do you mean by that?

Mr. Castro: Did you use the account in the last

(Testimony of Mrs. Ellen Van Harpen.)

two months before the fire to pay any obligations of the Eureka Lumber Company?

The Court: Hasn't that already been testified to?

Mr. Castro: No, it has not, your Honor.

The Court: I think it has. The plaintiff himself spoke about that.

Mr. Castro: We do not have to accept the plaintiff's testimony, your Honor.

The Court: The son had paid out of his own account the cost of merchandise. [519]

Mr. Castro: We are not bound by the plaintiff's testimony on it.

The Court: You want to prove something to the contrary?

Mr. Castro: Yes, your Honor.

A. There were no deposits made. I couldn't state exactly it was two months. It may have been two months, six weeks or something like that.

Q. (By Mr. Castro): There were no deposits made into the Harold Dee Jensen account?

A. No.

Q. How was it that no monies were deposited in during that period of a month to six weeks?

Mr. Hilger: I am going to object to this unless I can have a little chance at voir dire here.

The Court: It is a pretty broad question.

Mr. Hilger: Yes. There has been no establishment that she had all the knowledge concerning this account, that she had the right to withdraw, and that she ordinarily made the deposits or she made all the deposits. There has been no establishment

(Testimony of Mrs. Ellen Van Harpen.)

that there was any connection between that account and the books of account of the Eureka Lumber Company.

Mr. Castro: I will withdraw the question and go further into the foundation.

Mr. Hilger: I object to any more questioning on [520] the account of Harold Dee Jensen until such is established.

Q. (By Mr. Castro): Within a month to six weeks of the fire did you have any knowledge of whether checks which were drawn on the account of Harold Dee Jensen were honored when they were presented to the bank?

Mr. Hilger: I will object to that as being incompetent, irrelevant and immaterial as to what the bank might have done with the checks.

The Court: Sustained. I do not see what that has to do with this case.

Q. (By Mr. Castro): Did you have any knowledge of any checks being held at the bank waiting monies to be deposited in the account of Harold Dee Jensen?

Mr. Hilger: I will object to that likewise as being incompetent, irrelevant and immaterial and not having anything to do with this case.

The Court: So far as I can see that is correct.

Mr. Castro: We are offering this evidence on the basis again of motive, your Honor.

Mr. Hilger: What?

The Court: I will sustain the objection. I can't

(Testimony of Mrs. Ellen Van Harpen.)

see any question of motive involved as yet in this case.

Q. (By Mr. Castro): At the time of this fire was there any accounts due the Lumber Wholesale Company?

Mr. Hilger: Objection. Incompetent, irrelevant [521] and immaterial to any issue in this case at this time.

The Court: I will sustain the objection as to any financial status of the concern on the same ground on which I heretofore ruled in connection with similar questions.

Q. (By Mr. Castro): On the morning of this fire was any creditor of the Eureka Lumber Company at the office concerning the payment of his account?

Mr. Hilger: That is objected to as incompetent, irrelevant and immaterial at this stage of the proceeding; the same line of questioning.

The Court: Sustained. I want to make it clear that I am only ruling on this evidence at this time.

Mr. Castro: Perhaps I do not quite understand what your Honor is saying.

The Court: You can't prove motive of something until you have first brought in the corpus delicti, as it were; because somebody has a creditor or his aunt is sick you can't bring that in as evidence of arson. You first have to have some foundation for it.

Mr. Castro: Well, we have proved here—I would

(Testimony of Mrs. Ellen Van Harpen.)

like to discuss it with your Honor. I would like to discuss the problem in front of the jury.

The Court: I think it is quite clear to me that the testimony is not admissible at this stage of the case.

Mr. Castro: Then I would like to make an offer of [522] proof, because Mrs. Van Harpen is going back to Eureka this evening, your Honor.

The Court: All right. It is a little past 3:00. The jury can go out for its recess now and I will hear your offer of proof.

(The jury left the courtroom and in their absence the following occurred:)

Mr. Castro: Concerning the foundation I would like to state this to the Court: That accepting the testimony of the plaintiff as true and correct, that he had redwood moldings stacked in the areas that he has indicated, that in the center of those areas were found the two cans of inflammables in high-priced molding of \$220,000, there was evidence that in the room where the fire is said to have originated, not only by the opinion of the witness this morning but also by Neil Jensen, who saw the fire in the area, that there was evidence on the flooring of the room that flammable liquids had been placed in the floor area, I think from that evidence the jury can infer or make a finding on circumstantial evidence of arson. We can go one step further and connect Dee with it through his conduct as observed by the witness Musser fleeing the scene. That is the foundation from the arson standpoint.

(Testimony of Mrs. Ellen Van Harpen.)

The Court: Have you any other evidence along that line except what you have already presented which you intend to present? [523]

Mr. Castro: Not along that line. I think I have presented everything I know of at this time.

The Court: On the basis of the evidence that has been presented I would take that issue away from the jury. I say that to you unequivocally because in my opinion there isn't the slightest evidence that would justify the cross-complaint in this case, nor any evidence from which an inference could be drawn. There is only your argument and your statements. There is nothing excepting the question of the amount of redwood. Of course, that goes to the amount of the claim, and on that there is some conflict. That is an issue for the jury to determine.

Mr. Castro: The question of motive, and that element of the case is just as important as on the arson end of it, and they have designated 101,000 board feet of lumber in there.

The Court: That may be a question of the correctness of the claim. You can argue that to the jury.

Mr. Castro: And the financial circumstances concerning their background at the time of the loss is certainly evidence of motive and falsification.

The Court: I can't see anything that would justify submitting that issue to the jury. There is nothing by way of motive that would justify the submission of that to the jury as far as I can see. I have listened to the testimony very briefly. If you

(Testimony of Mrs. Ellen Van Harpen.)

have no more evidence on it, I would instruct the jury [524] to take that issue from the jury, and I might even go further in my instructions to the jury, counsel. I do not think the charge of arson, which is a charge of a felony, can be lightly made by an insurance company against a businessman unless they know what they are doing when they file the charge, and it can't be used as a method of defense to a claim unless there is some substantial evidence from which some inferences can be drawn, not because it is a moral question, that he hasn't got much money, not doing much business, may owe some money, and they have some cans in their place of gasoline or other inflammable material which are used there. Somebody sees a man drive an automobile and he is driving a little fast. Those are not things from which justification can be drawn for the proof of what amounts to a felony. I wish to make myself quite clear to you at this point. That is why I asked the question the other day as to whether there would be any other evidence along that line, because I do not want to prejudge that question, but on the basis of your laying the foundation for the question to this witness, you might just as well know what I think about the evidence on that subject so far.

Mr. Castro: I offer to prove by this witness that the account referred to in the name of Harold Dee Jensen, the deposits into such account have been stopped by the Eureka Lumber Company, because there were outstanding bad checks against the ac-

(Testimony of Mrs. Ellen Van Harpen.)

count, for which there were insufficient funds to cover after [525] they had been issued; that the lumber wholesalers had such checks; that the account in the name of the lumber wholesalers was approximately \$18,000; that on the morning of the fire the Northwestern Pacific representative had been in their office for the collection of a delinquent account, a thousand or in excess of a thousand dollars, which was promised to be paid that afternoon, and there was no cash in either bank account to cover that obligation. Those are the items that I wish to prove and that I believe this witness would testify to.

The Court: I would hold that that is not admissible in proof of the claim made in the course of the defendant's case. It might justify the plaintiff committing suicide, having a holdup, or any of a number of a thousand things, but motive does not prove offense. There might be a motive for the plaintiff in the case to do many things if he was in sore straits, but that does not supply the evidence that is needed to prove a charge of arson. So I will hold that the evidence is incompetent, irrelevant and immaterial at this stage of the case.

Mr. Castro: Those are all the questions I have on the direct examination of the witness, your Honor.

The Court: We will take a brief recess.

(Recess, after which the jury returned to the courtroom and the following proceedings were in their presence:)

(Testimony of Mrs. Ellen Van Harpen.)

Mr. Castro: I have completed the direct examination.

The Court: Any cross? [526]

Mr. Hilger: Yes, your Honor.

Cross Examination

Q. (By Mr. Hilger): Mrs. Van Harpen, your duties did not require you ordinarily to go into the west portion of the building, did they?

A. The shed.

Q. The shed. A. Not ordinarily.

Q. You stated that there was a pile of molding in through here but you did not know how big it was?

A. I couldn't give you any footage in it, no.

Q. You are familiar, are you not, with the acquisition of a rather sizeable quantity of Anzac material from the Eureka Redwood some time prior to the fire? Do you recall that transaction?

A. They purchased material from Eureka Redwood regularly, but the term "Anzac" is not familiar to me.

Q. You do not know of your own knowledge where that was stored at the time of the fire, do you?

A. As a rule it was stored out in the yard.

Q. But you do not know where it was stored at the time of the fire, do you?

A. Are you talking about the Anzac?

Q. I am talking about the Anzac or any or all of it. A. No. [527]

Mr. Hilger: Thank you.

(Testimony of Mrs. Ellen Van Harpen.)

Redirect Examination

Q. (By Mr. Castro): Had you ever seen any large shipments of molding stored in the shed at any time up to the fire?

Mr. Hilger: I object to the use of the word "large."

Q. (By Mr. Castro): Shipments of 20,000 feet or 30,000 feet?

A. No. The molding that was there, was there when I started working there that I am talking about.

Q. Could you tell us anything about the size of that pile physically?

A. Well, as I said, it was scattered. It was not piled high. It was criss-crossed perhaps three or four deep and covered, I believe, an area twelve by fourteen, maybe larger than that.

Mr. Castro: Twelve by fourteen feet? Those are all the questions I have, your Honor.

Mr. Hilger: That is all.

B. C. WOLFE

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you please state your name to the Court and jury, sir?

A. B. C. Wolfe. [528]

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Wolfe? A. Eureka.

(Testimony of B. C. Wolfe.)

Q. And you have lived in the area about how long? A. Ten years.

Q. What is your occupation or business?

A. I am an engineer for a sawmill construction firm and in new and used machinery.

Q. Academically you are a Massachusetts Institute of Technology graduate, are you?

A. That is correct.

Q. You have been in that business about how long?

A. My current position about four years.

Q. How long have you been in the machinery business relating to sawmills?

A. Since 1947.

Q. Following a fire that occurred at the Eureka Lumber yard in the City of Eureka did Mr. McMullin of the General Adjustment Bureau of that city ask you to visit the scene of that fire and look at a portable sawmill?

A. That is correct.

Q. About how long after the fire was it that you went to look at the sawmill?

A. I couldn't be specific as to the date, but I believe it [529] was about three or four days.

Q. At that time did you see a sawmill which was located in the position shown in this photograph Defendant's AC? A. Yes, that is correct.

Q. At that time was part of the roof down on the saw machine as it is shown in that photograph?

A. No, because I walked around the whole machine at that time.

(Testimony of B. C. Wolfe.)

Q. What is the approximate size of that? First, is that a portable sawmill?

A. In the sense that it can be dismantled and moved it is a portable sawmill, yes.

Q. I show you another photograph. Is that taken showing the front as contrasted with the rear of that sawmill?

A. Yes, this photograph was taken on the street side.

Q. In the testimony there has been testimony to a movable wooden platform that moved with the saw of that sawmill.

A. Well, in normal sawmill construction, including this particular piece, there is no necessity for any moving wooden platform, and there was on this item there.

Q. There wasn't on this item?

A. No, there was no reason for it being there.

Q. There is a platform, however, with this sawmill, is there not?

A. Yes, it is shown on this photograph here.

Q. I show you Exhibit D. Does that show the platform to which you have reference?

A. This platform in here is what is normally referred to as an offbear platform, and the one shown on this photograph is the sawyers platform.

Q. Are you familiar with redwood molding?

A. Not specifically. I know what it is. I know what is is used for.

Q. When you visited the mill there after the fire did you find any evidence of redwood molding

(Testimony of B. C. Wolfe.)

remains on top of the platform or any part of the redwood saw?

A. There was no molding or any other type of merchandise on top of the platform, because I walked all around it and on top of it.

Q. Did you find anything to indicate to you that any part of that sawmill had been completely consumed?

A. No, there wasn't any evidence of anything being consumed. Most sawmill equipment is steel and it doesn't burn very well in a fire.

Q. And so far as the wooden members of that sawmill are concerned, was there any total consumption of any portion of the wooden mill?

A. No, they were slightly charred on the outside, maybe ten per cent.

Q. Did you look at the machinery with the thought of a [531] possibility of repairing the machinery? A. Yes, I did.

Q. Does part of the work which you do include the repair of such machinery?

A. Yes, it does.

Mr. Hilger: I object to this. In connection with this sawmill, salvage does not appear to enter into the valuation——

Mr. Castro: I am not going to ask him a question on the salvage.

Mr. Hilger: If he is not going to ask any question about the value after the fire, then, I will object to the whole business as being pointless.

(Testimony of B. C. Wolfe.)

Mr. Castro: I am asking him whether the cost of the repair of that machinery, which is provided for under the policy——

The Court: I don't quite follow you on that. What is the point of that?

Mr. Castro: The policy provides that you insure to the extent of the actual cash value not exceeding the cost of repair or replacement.

Mr. Hilger: Except in matters where the damaged or lost merchandise has been sold and remains undelivered.

Mr. Castro: There is no such provision.

Mr. Hilger: The policy provides that the [532] measure of value on items which are sold but remain undelivered is the sale price thereof.

Mr. Castro: No, the policy provides in paragraph 3, the building form endorsement, Your Honor, in the event there has been a sale of a particular piece of property and it is still on the premises, the sale price shall constitute the actual cash value wherever the term "actual cash value" is referred to in the policy.

The Court: What is the point here, that there was some limit to the liability of the insurance company on this mill?

Mr. Castro: The point is, the mill was repairable at less than \$7,500.

Mr. Hilger: That would not compensate the insured.

The Court: Then this would become a question

(Testimony of B. C. Wolfe.)

of law or instruction to the jury.

Mr. Castro: Yes, it would, Your Honor.

The Court: If you are right about it, you would have to have some evidence in the record to cover it.

Mr. Castro: That is right.

The Court: If your opponent is right about that, then I can instruct the jury to disregard this evidence.

Mr. Castro: That is correct.

The Court: Then I see no harm in allowing it in. It may go in subject to the ultimate determination of its [533] materiality.

Q. (By Mr. Castro): Did you make any investigation of this sawmill to determine whether or not it was repairable? A. Yes.

Q. Did you reach any conclusions as to whether it could be repaired? A. Yes, it is repairable.

Q. Did you reach any conclusions as to the cost of that repair? A. Yes, I did.

Q. What in your opinion was the cost of the repair of that sawmill?

A. Approximately \$1,700.

Q. Have you been back to look at that sawmill since your first look at it? A. Yes, last week.

Q. Has there been any change in the condition of that sawmill over the period so far as the condition of the mill is concerned, over that period of time?

A. The first time I looked at it it was just through a fire. Now it is completely rusted.

(Testimony of B. C. Wolfe.)

Q. Were any steps taken so far as you could see on any equipment to protect against rust?

A. None whatsoever.

Q. Are there ordinary steps which are recognized in the [534] machinery industry for protecting that type of equipment?

A. Yes, on salvageable machinery they used normally a fish oil base of paint or grease or oil.

Q. Reference has been made that the carriage of the machine was warped. Did you inspect the carriage of the machine? A. Yes, I did.

Q. What was its condition so far as being repairable, usable, or warped?

A. Well, it is still usable. It would require new bearings, but the frame proper is O.K.

Q. With reference to the tracks on which that saw traverses, were they warped?

A. No, I can't say that they were.

Q. In your work have you become acquainted with the capacity of loaders so far as area for hauling of lumber?

A. In a sense. I have not made any specific study of it.

Q. For instance, if I told you that we were dealing with 66,000 board feet of redwood molding, would you be able to tell us approximately how many freight car loads that would constitute?

A. I could compute it and give you a figure on it.

Q. What approximately would that be, Mr.

(Testimony of B. C. Wolfe.)

Wolfe? A. You said sixty-six?

Q. 66,000 board feet.

A. Well, a normal truck unit of about eight feet by eight feet by twenty feet would contain approximately 15,000 feet, if [535] we are speaking of board measure as such.

Q. With that in mind, would 66,000 board feet, so far as freight cars are concerned, be two or more freight cars of lumber?

A. If the weight was no factor, you could possibly get that much in two large cars.

Q. What in your opinion would it represent in carloads? A. Two or better.

Q. In your opinion what would 35,000 board feet of redwood fencing represent in carloads?

A. Probably a car and a quarter, a car and a half possibly, according to the weight of it.

Q. In walking around the sawmill did you walk in this area between the sawmill and the middle partition of the building? A. Yes.

Q. Did you find any evidence or see any evidence in there of any debris or redwood molding?

A. The only debris I noticed was the charcoal that fell off the timbers around there.

Q. What timbers do you have reference to, Mr. Wolfe?

A. The wall of the building and what charcoal fell off the timbers under the mill proper. There is a space of four or five feet. I didn't measure it. I had no reason to.

(Testimony of B. C. Wolfe.)

Mr. Castro: I believe those are all the questions I have on direct examination, Your Honor. [536]

Cross Examination

Q. (By Mr. Hilger): Mr. Wolfe, you were hired by the defendant to do this work, were you not; in a sense you were paid for it?

A. How do you mean?

Q. M-o-n-e-y.

A. I was invited to testify down here or asked if I would.

Q. You did not answer my question, Mr. Wolfe. You were hired and paid by the defendant to make these studies that you have testified to, weren't you?

A. No, sir, I was not.

Q. What was your arrangement with Mr. McMullin? He is the adjuster, is he not, for the insurance company?

A. He asked me at the time if I would come over and make an appraisal of this burnt machinery.

Q. How much did you get paid for your appraisal?

A. I get paid nothing. If we get a job for it, then we make the money on the rebuilds.

Q. You saw charcoal around on the floor area, that is, charred bits and pieces of the residue of the flames around on the deck or along this wall here, did you not? A. Yes.

Q. What type of instrument did you use to conduct your tests on this piece of equipment, Mr.

(Testimony of B. C. Wolfe.)

Wolfe? A. You need no instruments. [537]

Q. You just go along, sight along it, and that is it? Is that the way you conduct the test?

A. Well, no. What was the specific question?

Q. I just wanted to know what instruments you used to determine the condition of that sawmill, Mr. Wolfe. I believe you have answered me that you used no instruments.

A. That is right. I am in the business of appraising machinery for repair.

Q. How long did you take to appraise this?

A. Probably thirty minutes.

Mr. Hilger: That is all.

Redirect Examination

Q. (By Mr. Castro): Is any more time required to look at a sawmill of this size?

A. Well, for the amount of equipment there I spent a little too much time, because there are only three pieces there.

Q. What do the three pieces consist of?

A. One diesel engine, Cummins engine, one carriage of nondescript make, and one feed works, friction feed.

Q. Do you have to take the carriage apart to examine it to determine whether it is repairable or usable?

A. No, sir, I do not. Any of these photographs will show you most of the carriage.

Q. Do you have to take the friction portion apart to determine whether or not it is usable?

(Testimony of B. C. Wolfe.)

A. No, sir.

Q. Do you have to take the diesel motor apart to determine whether it is usable?

A. Yes, sir.

Q. What did you do in that connection?

A. Normally when we appraise a diesel that has been in a fire we check to see if there is oil in it.

Q. What is the significance of the oil?

A. Usually when the crankcase is full of oil the damage has not been hot enough to damage the casings.

Q. Did you make that check in this instance?

A. Yes, I did.

Q. What did you find?

A. That the crankcase was full of oil.

Q. Did you find anything else that would indicate to you whether the sawmill had been under any intense heat that would destroy the sawmill?

A. No, I did not. Normally, on diesel engines there are a few aluminum parts, and regardless of what the make of the engine, they normally melt off.

Q. And those parts are all replaceable, are they?

A. That is correct.

Q. And they melt at a far lower degree than the steel portions of that engine? A. Yes. [539]

Mr. Castro: I have no further questions.

Recross Examination

Q. (By Mr. Hilger): Those aluminum parts, many of them are right down in the middle of that diesel, aren't they, Mr. Wolfe?

(Testimony of B. C. Wolfe.)

A. No, they are on the outside.

Q. Some of them are on the inside, aren't they?
How about the babbit around any bearings?

A. If the oil is still in the crankcase, you can't melt the babbit.

Q. That is your opinion at least?

A. That is my knowledge.

Q. How about other aluminum parts that might appear on the insides? How about the brass? How about their melting point compared with aluminum?

A. Slightly higher.

Q. Very slightly, too, isn't it?

A. That is right.

Q. Aluminum is about 1400 and copper is about 1600, is that right? A. That is correct.

Q. A very slight change in temperature would melt the copper and brass bearing, wouldn't it?

A. Diesels have aluminum bearings normally.

Q. I thought they did not have aluminum inside where you [540] had to go after the bearings.

A. No one has said that yet.

Q. You said they were all outside.

A. You said parts. You said nothing about bearings.

Q. A bearing is not a part?

A. Not external, no.

Q. But it is internal, isn't it? A. Yes.

Q. You can't run the thing without it, can you?
Yes or no.

A. Will you repeat that, please?

(Testimony of B. C. Wolfe.)

Q. Can you run a diesel engine without bearings in it? A. No, you cannot.

Q. You did not look at those bearings, did you?

A. I didn't have to. The crankcase was full of oil.

Q. That is your final answer to everything: "We got oil, why, it is O.K." You made no further checks. Yes or no. A. No.

Q. Where was the feed works on a rig like this, Mr. Wolfe?

A. It normally sits under the carriage rails.

Q. You would have to do some getting to get under there and examine it, wouldn't you?

A. No, sir, it is in plain sight.

Q. Underneath the rails?

A. That is right, but there is a cutout section for it.

Mr. Hilger: That is all. [541]

Mr. Castro: I have no further questions, your Honor.

RICHARD HANNA

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court and jury? A. Richard Hanna.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Hanna?

A. In Berkeley, California.

Q. By whom are you employed?

(Testimony of Richard Hanna.)

A. Yellow Manufacturing Acceptance Corporation.

Q. Are you appearing here today as a result of a subpoena being served on your employer?

A. Yes, sir.

Q. That subpoena asked you to bring certain records relating to some trucking equipment being purchased by Hyrum N. Jensen.

A. Yes, sir.

Q. Have you brought those records with you?

A. I have.

Q. In specific, do you have a written contract involving, or which calls for a down payment credit on a portable sawmill? [542]

A. No, sir.

Q. Do you have a written contract on a truck where a sawmill was to be used as a down payment?

A. We have a contract on a truck, sir, but not with a sawmill as a down payment.

Q. What is the date of that contract?

A. January 12, 1956.

Q. May I see that contract?

A. Yes, sir. This is the contract itself.

Q. Do you have the original contract with you?

A. Not with me, no, sir.

Q. This is a photostat of that contract?

A. Yes, sir.

Q. Apparently you made several copies of the photostat? A. Yes, we did.

Q. Did that contract call for a trade-in of the portable sawmill? A. No, sir.

(Testimony of Richard Hanna.)

Q. What is meant under paragraph 2 where it refers to a portable sawmill? Maybe I am using the wrong term.

A. I am sorry. It does. Description of trade-in, portable sawmill.

Q. What is the credit to be received for the portable sawmill? A. \$4,000. [543]

Q. According to the terms of the contract, what was the total purchase price of the contract?

A. \$13,350.

Q. Did you receive anything else to show that any other credit was to be given except \$4,000 for the portable sawmill? A. No, sir.

Mr. Castro: I will offer the contract in evidence as Defendant's Exhibit next in order.

The Court: Any objection?

Mr. Hilger: I think I will object to it as being immaterial to show the deal or the arrangement between Dayton Murray Truck Sales and the Eureka Lumber Company. It is a part of the transaction, and insofar as the part is shown, it is in complete agreement with the evidence already in the record, but inasmuch as it is not the best evidence of the complete transaction between the two parties, I will object to it.

The Court: At least——

Mr. Hilger: It is corroborative of the first half of the transaction.

The Court: It shows what it shows so far as the acceptance company was concerned.

Mr. Hilger: But limited only to the entry of the

(Testimony of Richard Hanna.)

financing arrangement into the deal. In my opinion it is incompetent to establish what the actual dealing was between the two dealing parties. [544]

The Court: You say \$3500 credit was given?

Mr. Hilger: No, we say \$4,000 credit was given, and Dayton Murray Truck Sales obligated itself to pay YMAC an additional \$3500, and so far as YMAC goes, that is no concern of theirs. All their contract will show is the original down payment. Who pays the remainder they don't care, just so it is paid.

The Court: There is really no dispute about it, then.

Mr. Castro: They claim there is an additional contract besides this one.

The Court: No, that is not what counsel said. He said the contract between the buyer and the seller was made between the buyer and the seller. So far as the financing is concerned, it showed a down payment of \$4,000.

Mr. Castro: That is what it showed the transaction to be, reflected in the formal contract which was executed by the Dayton Murray Truck Sales.

The Court: I will allow it in if you tell me it is your contention that the transaction with reference to the additional \$3500 was some sort of fake or incorrect matter.

Mr. Castro: It is our contention that this constitutes the entire transaction as represented by this contract.

Mr. Hilger: Then I will object to it as it covers

(Testimony of Richard Hanna.)

[545] only a part of the transaction. There is in evidence already before this Court——

The Court: I do not see that it does any harm if it shows only part of the transaction.

Mr. Hilger: But if counsel is introducing it to try to show that it is the entire contract——

The Court: You can make that point at the time of your argument.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AO.)

Q. (By Mr. Castro): This contract was signed by a representative of the Dayton Murray Truck Sales Company, was it? A. Yes, sir.

Q. And what was his name?

A. W. A. Threlkeld.

Q. After the execution of this contract with Dayton Murray Truck Sales, who was to pay the payments under this contract to your company?

A. The Eureka Lumber Company.

Q. Was the Dayton Murray Sales Company to make any payments——

Mr. Hilger: I will object to that. The contract is the best evidence.

The Court: Yes, that calls for the opinion and conclusion of the witness. [546]

Q. (By Mr. Castro): Assuming this contract had been paid in full, would the Dayton Murray Truck Sales Company have any monies coming out of the payment? A. No, sir.

Mr. Hilger: What is that question again?

(Testimony of Richard Hanna.)

(Question read.)

Mr. Hilger: I object.

The Witness: No, sir.

The Court: Strike the answer. I will sustain the objection. The contract speaks for itself.

Q. (By Mr. Castro): Did you have other conditional sales contracts with H. M. Jensen referring to trucking equipment?

Mr. Hilger: I will object to that as incompetent, irrelevant and immaterial to any issue contained herein. We claim no loss of trucks.

Mr. Castro: I am not offering it for that purpose. I cross-examined the other day to show the interest of Dee Jensen in the particular Eureka Lumber Company. One of the questions which I was permitted to ask and which was answered by the plaintiff was whether or not, following the fire, he had transferred the trucks that were involved that were YMAC to Dee Jensen. He denied that he had.

Mr. Hilger: He said that he had tried to.

Mr. Castro: All right. [547]

Mr. Hilger: But he had not been able to do it.

The Court: I will sustain the objection on the ground it is incompetent, irrelevant and immaterial.

Q. (By Mr. Castro): Do you have any written assignments from Hyrum M. Jensen to Harold Dee Jensen concerning the truck involved in this particular transaction?

Mr. Hilger: Same objection, plus the fact that there is no date on the assignment.

(Testimony of Richard Hanna.)

The Court: There was no what?

Mr. Hilger: No time placed on when the assignments may have become effective. They are incompetent, irrelevant and immaterial anyway.

The Court: Yes. You are getting pretty far afield from the claim on the insurance policy. I will sustain the objection.

Mr. Castro: Mr. Hanna, you are handing me a document which I will ask to be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit AP for identification.)

Q. (By Mr. Castro): Was this account on this particular truck delinquent at the time, June 25, 1956?

Mr. Hilger: I object to it as incompetent, irrelevant and immaterial and cite that as misconduct.

The Court: Which contract?

Mr. Castro: The one that has been admitted in [548] evidence.

The Court: You are talking about AO?

Mr. Castro: Yes, your Honor.

The Court: Was it delinquent at the time of the fire?

Mr. Castro: Yes, that is what I am asking.

Mr. Hilger: I object to it.

The Court: Sustained. You mean by that, I take it, whether or not there were payments due the finance company that had not been paid. I will sustain the objection if that is the question.

(Testimony of Richard Hanna.)

Q. (By Mr. Castro): Had you received any checks from Hyrum M. Jensen covering any installments due prior to June 25, 1956?

Mr. Hilger: Same objection.

Mr. Castro: (Continuing) Which had not been honored by the bank when they were presented?

Mr. Hilger: Same objection.

The Court: Same ruling. Sustained.

Q. (By Mr. Castro): As of June 25, 1956, were you holding any checks of Hyrum M. Jensen?

Mr. Hilger: Same objection, your Honor.

The Court: Same ruling.

Mr. Hilger: I am going to suggest that further questioning along this line would be misconduct of counsel. [549]

The Court: It is prejudicial, I think. I will sustain the objection. I have already ruled, in the absence of the jury, that those questions are immaterial in the present state of the record.

Mr. Castro: Those are all the questions I have at this time, your Honor. At the close of the session this afternoon may I make an offer of proof concerning these matters I have been asking about?

The Court: Very well. I think the questions indicate the nature of the proof you are seeking to bring in, but you may make it formally if you wish.

Mr. Castro: Thank you.

Mr. Hilger: No questions of this witness.

Mr. Castro: At this time I would like to read from the deposition of Harold Dee Jensen, Jr.

HAROLD DEE JENSEN, JR.

Mr. Castro: Referring to the deposition of Harold Dee Jensen, which was taken on May 11, 1957, if I may, I would like to read the following portions of that deposition. Page 52, line 25:

“Q. Now, after the fire did you prepare any of the proofs of loss which were filed?

“A. I went over it with the accountant, Gene Fox, who is a C.P.A.

“Q. And did you give Gene Fox any figures for [550] the proof of loss?

“A. Yes. We went through the price books and inventories—invoices.

“Q. And did you discuss the proofs of loss with Hyrum Jensen before they were executed?

“A. Yes.

“Q. Did you prepare them for his signature?

“A. I think Mr. Hilger did that. We just made a rough longhand copy of it and took it up to Mr. Hilger's office, and Mr. Hilger's secretary typed it up; and Mr. Jensen went up there and discussed it with him. What he discussed, I don't know; I wasn't there.

“Q. Did you see the proofs of loss after they were prepared?

“A. Yes, I believe I did.

“Q. And where did you see them?

“A. In Mr. Hilger's office.

“Q. Did you review them in there with Hyrum Jensen before he signed them?

“A. I don't think he was with me. I just checked them over.

(Deposition of Harold Dee Jensen, Jr.)

“Q. In Hyrum Jensen’s absence you went up to Hilger’s office?

“A. He may have been with me, I can’t say for sure [551] whether he was or not.

“Q. But in any event, you did check the proofs of loss before they were signed?

“A. That’s right.”

With reference to another subject, page 76, line 12, question by Mr. Castro:

“Q. Did you go into any other portion of the building after you got back from the airport?

“A. Yes. I looked where he put the gas, and I took about a half-gallon out, and my boy has a little car, and I put some of the gas in his car for him.

“Q. About what time was it that you removed the half-gallon from the drum at X-11?

“A. Oh, it was right after we got back from the airport.

“Q. What did you put the half-gallon in?

“A. I don’t remember what kind of a container. I think it was a can or a gallon jug, or something.

“Q. And did the drum have a top to it?

“A. Yes.

“Q. Did you put the top back on the drum, of course?

“A. No, I put a pump in it. It was a regular pump, a self-serving pump. [552]

“Q. And then what did you do with the gasoline you had withdrawn?

“A. I put it in his little car.

(Deposition of Harold Dee Jensen, Jr.)

“Q. Where was the car located?

“A. It was in front of the office.

“Q. In the walk area or the building itself?

“A. It was in the walk area.

“Q. And will you indicate where in the walk area?

“A. I think it was right in front of the window right here (indicating).

“Q. Would you put an X there?

“(Witness marks document.)

“Mr. Castro: We will mark it No. 12.

“Q. Was that a four-wheel automobile?

“A. Yes.

“Q. And was it a gasoline-engine automobile?

“A. Yes.

“Q. Did it operate? “A. Yes.

“Q. Your son was how old?

“A. Oh, I think around eight.

“Q. Then you left him there with the automobile?

“A. There was someone riding with him. I don't remember who it was.

“Q. Did you leave him there with the automobile? [553] “A. Yes.

“Q. And would he drive that automobile?

“A. Yes.

“Q. How big an automobile was it?

“A. Oh, it's just a small one. It's made out of a tank, out of an airplane tank.

“Q. Kind of a scooter?

“A. Well, it is a little larger than a scooter. It

(Deposition of Harold Dee Jensen, Jr.)

has a little Briggs and Stratton motor in it; goes about five miles an hour."

Page 82, line 9:

"Q. Now, after you drew the gasoline from the drum and put it in the boy's automobile, what did you do with the container that you used to carry the gasoline? "A. I don't recall.

"Q. Did you put it back in the building?

"A. Most likely.

"Q. What is your best recollection as to what you did with it?

"A. No; I threw it in the back of his car.

"Q. You left it outside?

"A. Yes; I put it in the back of his car. In fact, I recall now, it was a can that I used, one of these service station cans that has a [554] little spout on it, a red can; and I tossed it in the back of his car.

"Q. Now, at the time of the fire, were there any employees at the Eureka Lumber Company that day? Did you have people employed there that day?

"A. The bookkeeper was there. I don't recall whether there was anyone working in the yard or not.

"Q. Was that Verna Musser or the other one?

"A. Van Harpen. Verna Musser wasn't working at the time.

"Q. Did you have anybody working under you on the day of the fire? "A. No.

"Q. Did Hyrum Jensen have anybody working under him? "A. I don't know.

(Deposition of Harold Dee Jensen, Jr.)

“Q. Were you there the day of the fire?

“A. Yes.

“Q. And you don't know what employees were working on the day of the fire? “A. No.

“Q. What time did you go to work on that occasion? “A. I don't recall that. [555]

“Q. Did you go to work before the fire occurred?

“A. Oh, yes. In the morning; I was probably there at 8 o'clock.

“Q. And the fire occurred, as I understand it, sometime around 12 noon, or shortly thereafter? Did you work up until the time of the fire?

“A. I worked up until 12 o'clock, a little after 12. In fact, about 15 minutes after when I left.”

Page 65 of the deposition, line 9:

“Q. Now, were there any doors in the building, so far as the east half of the building was concerned?

“A. This part along here (indicating)?

“Q. No, the east half would be where the office——

“A. Yes. There was one door to the outside, the east side. In fact, this is it right here.

“Mr. Castro: Yes. We will mark that door No. 8.”

Mr. Castro: Do you have the original diagram attached to the deposition, your Honor? No. 8 in the deposition is the door which was referred to as Roman numeral II here (indicating on Defendant's Exhibit A).

“Q. And how was that door, was it a sliding

(Deposition of Harold Dee Jensen, Jr.)

door? “A. No, it was a hinged door.

“Q. It was locked from the inside or outside?

“A. Inside. [556]

“Q. What type of lock was used on the inside?

“A. Oh, I don’t recall. There was some kind of a hasp on it. I don’t remember exactly.

“Q. Now, was there a door along the alley at the position marked ‘3’? “A. Yes.”

That is the door with the Roman numeral marked IV on this diagram, Defendant’s Exhibit A.

“Q. And a door at the position marked ‘2’?

“A. That’s right.”

That corresponds to Roman numeral III.

“Q. And then there was a front door on Third Street at the position marked ‘1’?

“A. That’s right.”

That is Roman numeral I on this diagram.

“Q. And then there was a doorway going upstairs in a position marked ‘6’?

“A. That’s right.

“Q. And alongside of it was a doorway marked No. 5?” (Which is this doorway.)

“Q. Is there some doorway——

“A. That’s right.

“Q. Is there some doorway not marked in there?

“A. No; they’re all in here. This one here is [557] the doorway to the window. I had just about forgot that.

“Q. We can mark that doorway No. 9, perhaps, and then there won’t be any confusion on that.”

“Q. Now, were there any locks on doorway 3?

(Deposition of Harold Dee Jensen, Jr.)

“A. Yes.

“Q. Was that locked from the inside or the outside? “A. Both places.

“Q. And doorway 2, was that a locked door?

“A. I think there's a hasp on the outside, but it was just locked from the outside.

“Q. What type of lock did you have on the inside of that door?

“A. That was just a hasp.

“Q. How was No. 1 door closed, or locked?

“A. It had a key to it.

“Q. And were either doors, 5, 6 or 9 kept locked?

“A. As a rule 5 was kept locked, and when I was out of town, as a rule, 6 was kept locked.

“Q. 6 is the doorway that leads upstairs to the office section? “A. Upstairs, yes.

“Q. Now, was there any doorway in the retail end of the building, or the east side of the building, as I call it? [558]

“A. Well, this one here (indicating).

“Q. So far as outside entrances were concerned?

“A. No, that's all of them.

“Q. Was there any doorway direct from the east half of the building into the west half of the building?

“A. Yes, there is a doorway right here (indicating).

“Q. That would be a door in this general location? “A. Yes.

“Mr. Castro: Marked No. 10.”

(Deposition of Harold Dee Jensen, Jr.)

And it corresponds to Roman numeral V on Defendant's Exhibit A.

"Q. Now, was that door locked?

"A. It was locked with a hasp.

"Q. From the inside or outside?

"A. Inside.

"Q. Now, how many keys did you have to the No. 1 door? "A. Three, I believe.

"Q. Who had those keys?

"A. I had one, my father had one, and the bookkeeper had one."

The Court: How much of this are you going to read, counsel?

Mr. Castro: I am going to show that each of [559] the doors in the building was locked at the time Harold Dee Jensen left the premises at 12:15.

Mr. Hilger: We will stipulate that they were locked. They don't go off and leave a building unlocked.

Mr. Castro: Will you stipulate that they were not forced open by anybody before the fire was discovered?

Mr. Hilger: I won't stipulate to the time of the day except the facts, counsel. I think we have been over this three or four times. The doors were all locked.

The Court: So do I. I do not want to impose upon this jury, but we are going to finish this case some time or other. There is so much repetition. I think we will stay here today until we finish. What

(Deposition of Harold Dee Jensen, Jr.)

is the materiality of reading all this business about those doors again?

Mr. Castro: The materiality of this business is simply this, that the building was locked up, that the fire was discovered in the room which is marked SW, that there was no normal source of the fire in there such as a heater, lighting unit, or anything of that character.

The Court: I did not ask you that. I said what is the materiality of reading all this stuff about the doors when counsel has stipulated with you and it is already in evidence that these doors were locked.

Mr. Castro: If you agree that is the stipulation, I accept it, but I had to read it before I could get the stipulation. [560]

The Court: There is already evidence that you brought out in cross examination to the same effect.

Mr. Castro: I needed the stipulation to tie it down, your Honor, and I am thankful to get it.

Mr. Hilger: You are welcome.

Mr. Castro: With reference to page 44 of the deposition, line 11——

Mr. Hilger: I object to this as being covered under the ruling heretofore given as incompetent, irrelevant and immaterial to the issues here raised.

The Court: How far do you want to read, counsel?

Mr. Castro: I would like to read commencing with line 11 to page 45, line 7.

(Deposition of Harold Dee Jensen, Jr.)

The Court: You want to offer that in connection with the amount of lumber purchased?

Mr. Castro: That is correct.

The Court: I will allow that.

Mr. Hilger: Where are we starting now?

The Court: Line 11, I think he said.

Mr. Hilger: May we begin at line 6, then, as long as we are going to cover this?

Mr. Castro: I shall be glad to read any part you want me to.

"Q. Had business been going along where the [561] Eureka Lumber Company was making money, or was it losing money; or what was the general——

"A. It was making money.

"Q. And about how much was it making?

"A. I think in 1955 it was approximately \$20,000 profit.

"Q. And was there any change in business following the close of '55?

"A. Yes; the lumber business had dropped off considerably, the price had dropped.

"Q. And was that reflected in the Eureka Lumber Company?

"A. Yes, it was reflected in every company, every lumber company.

"Q. Was there any change in the amount of lumber that you were buying in 1956 as a result of that? "A. Yes.

"Q. What did you do with relation to buying lumber in 1956?

"A. You say, what did I do?

(Deposition of Harold Dee Jensen, Jr.)

“Q. Yes.

“A. Well, I just purchased the amount they were selling.

“Q. And was that substantially what you had [562] been purchasing in 1955?

“A. It wasn’t as much.

“Q. Percentagewise, how much did you reduce purchases? “A. I couldn’t say.

“Q. Approximately? “A. I couldn’t say.

“Q. Was there any drop in the amount you were selling? “A. Yes.

“Q. And approximately what did that amount to during that six months?

“A. I couldn’t say that, either.

“Q. You cannot give us an approximation on it?

“A. No, I couldn’t.”

Mr. Castro: At this time I would like to offer in evidence the invoices referred to in the deposition of H. B. Whittet, which was read by plaintiff earlier in the trial of the case.

The Court: They were not attached to the deposition?

Mr. Hilger: They were not, your Honor. We have no objection to the defendant offering them.

The Court: Mark them in evidence.

(The invoices referred to were thereupon received in evidence and marked Defendant’s Exhibit A Q.) [563]

Mr. Castro: At this time I would offer in evidence the deposition of G. R. Abrahamson taken on September 18, 1957.

Mr. Hilger: I will object to this on the ground it is incompetent, irrelevant and immaterial in all respects. It addresses itself to an indebtedness that this gentleman had on the purchase of a home, which indebtedness was subsequently paid.

The Court: I will sustain the objection made by counsel on the same grounds heretofore stated by the Court, and you may mark the deposition for identification if you wish.

(The deposition referred to was thereupon marked Defendant's Exhibit AR for identification.)

Mr. Castro: At this time I will offer in evidence the deposition of Angelo Franceschi, manager of the Crocker-Anglo Bank of Eureka, taken on September 18, 1957.

Mr. Hilger: There are two depositions, one of September 7th and one of September 18th.

The Court: Which one do you offer?

Mr. Castro: The one of September 18th.

Mr. Hilger: I will make the same objection to this deposition that I made to the previous one, your Honor.

The Court: This concerns financial transactions with the bank?

Mr. Hilger: That is all.

The Court: Nothing else is involved? I will [564] sustain the objection on the same ground. The deposition may be marked for identification.

(The deposition referred to was thereupon marked Defendant's Exhibit AS for identification.)

Mr. Castro: Call Mr. Stearns.

The Court: How long is this going to take?

Mr. Castro: Probably a half hour.

The Court: Is this your last witness?

Mr. Castro: I have I think possibly two more witnesses.

The Court: What is this witness going to testify to? The inventory?

Mr. Castro: Yes.

The Court: You are bringing some other witnesses here besides Stearns?

Mr. Castro: I have some on Monday morning, yes.

The Court: Will that relate to the subject matter of the amount of the inventory, too, do you think?

Mr. Castro: Yes, your Honor. One of them will.

The Court: Gentlemen, I took this case here because of the fact that it was stated that counsel were willing to come down here to San Francisco. I was agreeable to taking the case, but I have another case scheduled for I believe Tuesday or Wednesday of next week. I will excuse the jury first and then I will tell you what to do about it afterwards. [565]

(To the jury.) I guess we will have to take the weekend off, members of the jury. Will you come back on Monday morning at ten o'clock, please. The Court will remain in session.

(The following proceedings were had in the absence of the jury:)

The Court: I do not want to be complaining

about this matter, gentlemen, but, as I say, I took this case on the assumption that it was a case that could be disposed of this week, because another important case is scheduled for next week. I note it has not been pre-tried. All of the issues should have been arranged in this case. This case should not have taken more than a couple of days to try. Many of these questions could have been ruled on and determined at pre-trial. I find it has degenerated into a sort of an accounting case, which never should have occurred. Some of these issues should have been referred in this case and the time of the Federal Court not taken up on matters that appear to be somewhat matters of accounting. I am only mentioning that to you because I do not want to keep you here long hours. It is not fair to do that, nor is it fair to the jury. But I would like to know now definitely how much more time this case is going to take. I understood from the Clerk that counsel told him the evidence would be finished today. Now I find you still have many more witnesses that you speak of bringing. How much longer are we [566] going to take in the case? I ask you that not to be captious about it but just because I have other commitments. This case came down from Sacramento and is not on our regular calendar. That is the only reason I am belaboring the point. Can you tell me now with any definiteness how soon the evidence in this case will finish?

Mr. Hilger: I am ready to go to the jury, your Honor. [567]

The Court: That does not answer my question.

Mr. Hilger: I am afraid it will have to be up to Mr. Castro.

The Court: Mr. Castro is the one putting on the defense now. I would like to get some idea.

Mr. Castro: I would like to state, your Honor, that your clerk inquired of me earlier in the week. I thought we would have completed our evidence by Monday noon. I so informed him. As late as today I thought I would have one or two short witnesses for Monday morning. I do not feel I misrepresented the defense in a trial of this case.

The Court: I am not saying that you misrepresented. If I had known we would have to run over to Monday I would have let them go earlier. I do not believe in keeping counsel here long hours despite my remarks that we would sit here to finish the case. Can we have some understanding that we can complete the evidence, say, by noontime on Monday?

Mr. Castro: That would be my understanding, your Honor.

The Court: Then we could perhaps have argument in the case on Monday afternoon and submit the case Tuesday to the jury. Then I know where I am at in respect to further commitments.

Mr. Hilger: I have commitment, too. I begin another trial Tuesday morning in Humboldt County.

The Court: I do not know what we can do about that.

Mr. Hilger: I had certainly hoped we would be through by now, or, rather, that the case could be submitted to the jury Monday afternoon.

The Court: If it is not too late we can do that. I want to discuss the instructions to the jury and the issues to be submitted to the jury. I do not want to submit it to the jury too late. This is going to be a difficult case on the facts for the jury to decide on the amount involved. There are some amounts the Court maybe can give some instruction on, depending, of course, on the law, such as this machine. But there are other items in which there is a divergence in the evidence concerning amount and even to some extent the values involved. There are a large number of photographs in evidence. Has anybody prepared any schedules of the manner in which the amount is arrived at according to the evidence in this case?

Mr. Hilger: I have a schedule that I worked up for my own use.

The Court: So there is something the Court can see in the presentation to the jury and know what the manner of computation is on both sides. The reason I mentioned that is I would not like to submit the case to the jury under those circumstances at some late hour on Monday.

Mr. Hilger: I can arrange with my partner to pick a jury for me on Tuesday. [569]

The Court: I do not see how you can be there Tuesday morning in the present posture of this case. I would not want to submit this case to the jury without giving them some help in segregating and defining the issues that are involved here. Otherwise it would be asking them to make some guess about the case. That is going to take a little time.

Mr. Hilger: I will arrange my schedule accordingly.

The Court: All right. I am sorry I kept you so late. [570]

Monday, September 30, 1957

The Court: Jensen vs. Boston Insurance Company.

Mr. Castro: Ready for the defendant, your Honor.

Mr. Hilger: Ready for the plaintiff, your Honor.

Mr. Castro: We would like to recall Mr. John Driscoll at this time. He is the gentleman from the Eureka Redwood Company, your Honor.

The Court: Very well.

JOHN DRISCOLL, JR.

was recalled as a witness on behalf of the Defendant, and having been previously duly sworn, testified as follows:

Q. (By the Clerk): Please state your name to the Court again for the record.

A. John R. Driscoll, Jr.

Further Direct Examination

Q. (By Mr. Castro): Mr. Driscoll, on Friday afternoon you received a list of numbers from Mr. Hilger while you were here as a witness; do you recall that? A. Yes, sir.

Q. And you were to ascertain whether you could locate those documents or any other documents relating to redwood molding, kiln-dried molding sold and delivered to the Eureka Lumber Company.

(Testimony of John Driscoll, Jr.)

Have you taken any steps to locate those numbers or identify them? [571]

A. Yes, sir. After leaving the court last Friday afternoon we sent a teletype to Mr. Carl S. Walker, who is administrator for the Simpson Redwood Company, requesting that—and if you want me to read this I can and I think it covers everything you requested.

Q. Is the substance of it your request that each of those numbers would be given to you on Friday afternoon?

A. “All invoices of sales of lumber to Eureka Lumber Company by Hill and Morton, Incorporated, and shipped to Eureka Lumber Company from August 1, 1955, to June 25, 1956, including shipments reflected in the following invoice numbers.” And in addition to those numbers, those invoices which we had in court, we requested all the other invoice numbers that were submitted by opposing party.

The Court: I understand you made that request.

The Witness: It was requested that they be mailed airmail special delivery to my attention in San Francisco, and at the time I left for court this morning they had not arrived. However, we were assured personally at the mill level that they would work on this, and it was expected as soon as they can get them in the mill—I am sure that is the only delay—we will have them available, but at this time they have not arrived.

Q. (By Mr. Castro): With reference to the list

(Testimony of John Driscoll, Jr.)

which you received there were certain numbers which were prefaced with an "ER." What does that preface "ER" mean? [572]

A. ER would indicate through examination of some of the papers in this file that it is an order acknowledgment, ER supposedly meaning Eureka Redwood.

Q. And the other numbers would be invoice numbers without a letter preface?

A. That is correct.

Q. What is the record which you have to determine whether an order has been filled and shipped?

A. An invoice.

Q. An invoice record. That is the only record which you would have to show?

A. That is correct.

Q. Reference was made to an invoice involving California Redwood. Do you recall that, in January of 1956?

A. Yes. I am looking at one, a January 9th invoice.

Q. I will show you Exhibit AN. Is that the first invoice? A. That is correct.

Q. What is the term "294" mean with relation to shipments "MRD"? What does that mean?

A. Where is that?

Q. When it is used on your invoice, what does the term "MRD 294" mean, do you know?

A. Is it on this invoice?

Q. Yes.

(Testimony of John Driscoll, Jr.)

A. Oh, MRD, yes. That would stand for Malarkey Red Diamond, pattern 294. [573]

Q. What is pattern 294?

A. It is a standard redwood pattern. It could be V Rustic. I would want to refer explicitly to a pattern book to describe it. It is a standard pattern.

Q. Is that what you would call a V joint ship lap pattern? A. Offhand I would say yes.

Mr. Castro: Those are all the questions I have of Mr. Driscoll at this time. I would ask that he notify the clerk just as quickly as those come in. If the evidence is not closed we would want him to return.

The Court: Any questions?

Mr. Hilger: No questions.

The Court: Would you notify the clerk as soon as you get the documents?

The Witness: Yes. They should be in the morning mail.

Mr. Castro: Your Honor, Friday when Mr. Wolfe was on the stand I had him identify a photograph of the front end, of the street and of the sawmill, and the clerk called to my attention that I had not asked that it be offered as an exhibit.

The Court: Any objection?

Mr. Hilger: No.

The Court: Mark it.

(Defendant's Exhibit AT for identification was thereupon received in evidence.) [574]

RUSSELL M. STEARNS

was called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you please state your name to the Court and jury?

A. Russell M. Stearns.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Stearns? A. In Piedmont.

Q. What is your profession or business?

A. I am a Certified Public Accountant.

Q. Are you self-employed or do you work for some organization?

A. I work for Peat, Marwick, Mitchell and Company.

Q. With reference to the Eureka Lumber Company, did I request you in September, 1956, to go to Eureka and examine the records of the Eureka Lumber Company? A. Yes.

Q. Following that request did you take a trip to Eureka? A. I did.

Q. On what dates were you in Eureka for that purpose?

A. October 3rd, 4th, and 5th, 1956.

Q. On that occasion did you meet Frederick Hilger, counsel for Hyrum Jensen? [575]

A. Yes.

Q. Did you meet Hyrum Jensen and Harold B. Jensen? A. Yes.

Q. Were you accompanied by anyone from your office to assist in the work? A. Yes.

(Testimony of Russell M. Stearns.)

Q. Who was that? A. Robert Bredal.

Q. Did you examine any records at that time of the Eureka Lumber Company? A. Yes.

Q. Where did you examine the records?

A. Some in Mr. Hilger's office and some in the office of the Eureka Lumber Company.

Q. In the course of that examination did you ascertain whether certain records were not in the group that you were examining? A. Yes.

Q. Did you have a discussion concerning those records in the presence of Mr. Hilger, Mr. D. Jensen and Mr. Hyrum Jensen?

A. In the presence of Mr. Hilger and Mr. D. Jensen.

Q. Where did that discussion take place?

A. Outside the office of the Eureka Lumber Company.

Q. Will you relate that discussion?

A. This discussion was after Mr. Hilger, [576] Mr. Thomas, Mr. Bredal and I searched the Eureka Lumber Company office for all the records we could find. We did not find the purchase record, the sales record or the accounts receivable record. So Mr. Hilger asked H. D. Jensen if he had the accounts receivable record at home. He said he had some records at home, and Mr. Hilger asked him to bring them to his office.

Q. Were those records made available to you thereafter during the time that you were in the city? A. Not on that trip.

(Testimony of Russell M. Stearns.)

Q. Did you also request the production of the general ledger? A. Yes.

Q. After making the trip in the first part of October, 1956, did you give me a written report as to the documents that you had not found?

A. I did.

Mr. Castro: I would like to offer at this time in evidence a letter of October 19th. First, a letter of September 26, 1956, addressed to the Eureka Lumber Company in care of Frederick L. Hilger.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit AU.)

Q. (By Mr. Castro): This was the letter which introduced you to Mr. Hilger of the Eureka Lumber Company? [577] A. Yes, it was.

Mr. Castro: At this time I will offer in evidence a letter of October 19, 1956, addressed to the Eureka Lumber Company, Hyrum M. Jensen, Harold B. Jensen, in care of Frederick Hilger.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit AV.)

Q. (By Mr. Castro): Calling your attention to Exhibit AV, would you review the records which are referred to in that exhibit and state whether or not those were the records that you had not seen on your trip to the Eureka Lumber Company?

A. The first is the general ledger for the calendar years 1954, 1955, and 1956. I did not see any general ledger of the Eureka Lumber Company.

(Testimony of Russell M. Stearns.)

The second was an accounts receivable ledger. I did not see any accounts receivable ledger.

Three, combination cash and sales journal. I saw the *cash journal but not the cash journal*.

Four, all vendors' invoices and statements for 1956. I did not see those.

Five, all sales invoices for 1956. I didn't see those.

Six, all correspondence for 1956. I saw very little.

Seven, all payroll records including the entire month of June. I saw part of the payroll records for June. I can't say as to seeing all of them. [578]

Q. What is the significance of these records that you were requesting insofar as establishing an inventory is concerned?

A. It is quite essential in establishing an inventory in the books to have a beginning inventory to which you can add your purchases, both in quantity and in dollar value, and the sales, both in quantities and dollar values, so that you can add the purchases, deduct the sales, and have your quantities and values left at the end of the period.

Q. Is this method of taking a starting inventory from a written record of the insured, adding to it the purchases during the period, and deducting the sales a standard method for determining inventory as of a particular date? A. It is.

Q. From the cash journal which was shown to you were you able to determine the quantity of lumber which was involved in the cash journal entries? A. No, sir.

(Testimony of Russell M. Stearns.)

Q. Were you able to determine whether it was molding, fence board or some other type of lumber?

A. No.

Q. In January of 1957 did you return to the city of Eureka to check on records which were to be made available to you? A. I did.

Q. What date were you there in January of 1957? A. January 22nd and 23rd. [579]

Q. Whom did you see on that visit?

A. Mr. Hilger's secretary.

Q. Was that at his office? A. Yes.

Q. Were any records made available to you on that occasion?

A. The same records that were inspected before plus one ledger on which there was writing on one sheet, which was the last sheet in that book.

Q. Do you have either that ledger sheet or the copy of it?

A. I made a transcript of it.

Q. May I see that at this time?

(A document was handed to Mr. Castro.)

Q. Is this a true and correct copy of the sheet which was exhibited to you on that occasion?

A. On that occasion, yes, sir.

Mr. Castro: I offer it in evidence as Defendant's exhibit next in order.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AW.)

Q. (By Mr. Castro): How many days were you there in January, 1957? A. Two days.

(Testimony of Russell M. Stearns.)

Q. On that visit were any of the records exhibited to you that you had requested, such as the general invoices, the sellers' invoices or the accounts receivable sales journal? [580]

A. No, sir.

Q. And had you arranged with Mr. Hilger to make that visit to the city of Eureka in January of 1957? A. Yes.

Q. Had you agreed with him as to the date for your visit? A. Yes.

Q. Did you then return a third time in September of this year to examine records which were to be produced for you? A. Yes.

Q. What was the date of your third visit?

A. September the 18th and 19th.

Q. That is approximately a week to ten days ago? A. Yes, sir.

Q. On that occasion were you shown any of the books or invoices which have not been shown you but which you had been seeking before?

A. No, sir.

Q. Now, there are a lot of boxes brought in here. Do you know whether or not those were the boxes which you went through on your last visit up there in September, 1956?

A. They look familiar.

Q. Was that the situation also in January of 1956? A. Yes, sir.

Q. Did you attend the deposition of a man of the Eureka Redwood Company by the name of Haley J. Bertain on the 18th of September? [581]

(Testimony of Russell M. Stearns.)

A. Yes.

Q. In the course of that deposition did Mr. Bertain use a typewritten memorandum to testify concerning sales of redwood? A. He did.

Q. I show you Exhibit M. Is that the document which Mr. Bertain used? A. Yes.

Q. Were you given possession of that document during the deposition? A. Yes.

Q. Would you state what took place and how you happened to have possession?

A. I was given the document in order that I could call on the Simpson Redwood Lumber Company in the Russ Building in San Francisco and obtain copies of the invoices supporting this.

Q. And that was the Thursday before this trial was to start? A. Yes.

Q. And you were to contact the Simpson Lumber Company on the Friday when you were to return? A. Yes.

Q. Did you so contact the Simpson Lumber Company? A. Yes, I did.

Q. Did you receive from Simpson Lumber Company supporting [582] documents for the transactions listed? A. I did.

Q. Would you state the nature of those supporting documents?

A. They are invoices of the Eureka Redwood Lumber Company, most of them supported by shipping purchase orders, where the delivery was made in Eureka. The documents describe the—there is a description of the lumber as to the quantity,

(Testimony of Russell M. Stearns.)

whether or not they are kiln-dried or green, the per thousand price and the amount.

Q. Did you reflect that information on Exhibit M? A. Yes.

Q. How did you reflect it on Exhibit M?

A. There was one invoice which was omitted from this list which was furnished to me by Simpson Redwood Company which I wrote in in pencil.

Q. What invoice is that?

A. It is dated April 24th, 1956, for 6,000 feet of factory cuts, green, \$120.

Q. Are all the pencil notations on Exhibit M your notations? A. They are.

Q. Do they refer to each of the supporting documents that you have described? A. Yes.

Mr. Castro: I would offer this.

The Court: Is this the same list of documents [583] that you have asked the witness Driscoll to bring?

Mr. Castro: No, it is not, your Honor. This is the list which we subpoenaed actually, and this is the information which we were given on September 18th.

Mr. Hilger: Aren't the documents themselves in evidence? Weren't those invoices introduced when Mr. Driscoll testified?

Mr. Castro: There has been some contention that I possibly did not ask for the proper invoices, and I wanted to show that this is what their witness was testifying from, Mr. Bertain, at the time of

(Testimony of Russell M. Stearns.)

his deposition being taken. His deposition is incomplete, your Honor.

Mr. Hilger: The record specifically shows Mr. Bertain was not allowed to testify from any list.

The Court: These invoices have been introduced in evidence.

Mr. Hilger: Certainly they are, and they are the best evidence of the transaction.

The Court: I do not see what or how the witness' notations concerning them would be material.

Mr. Castro: I offered it at the time of the deposition of Mr. Bertain as being read into evidence, your Honor. At that time there was an objection that there were pencil notations on here, and without a foundation as to who made the pencil notations, it would not be admitted into evidence, [584] and that is the reason I have had Mr. Stearns testify as to the penciled notations on Exhibit M.

The Court: The original notations on Exhibit M are covered by the invoices that are marked in evidence, or maybe I misunderstand you. This list that you have in your hands is a list of the exhibits that have already been offered in evidence by Mr. Driscoll?

Mr. Castro: Yes, I believe that is correct, your Honor.

The Court: What is the purpose of this?

Mr. Castro: This is the document which Mr. Bertain was using at that deposition.

Mr. Hilger: It is a document that Mr. Bertain had with him at the deposition, but which he was

(Testimony of Russell M. Stearns.)

not permitted to testify from. He was allowed to refresh his recollection by reference to it, and then he was required to testify from his recollection.

The Court: What does this add to the case?

Mr. Hilger: Nothing.

Mr. Castro: It adds simply this, your Honor, that Mr. Bertain testified that the only items which were shipped to the Eureka Lumber Company were the factory cut items listed, and all items identified other than factory cuts went to customers of the Eureka Lumber Company rather than to the Eureka Lumber Company. [585]

The Court: All you have had this witness do is to testify that he was present at a deposition, and he says the witness at the deposition testified from a document. Counsel says he was not permitted to testify as to the document.

Mr. Castro: I call your Honor's attention to page 14.

The Court: That is disputing the record in the deposition.

Mr. Castro: It is not disputing the record in the deposition.

Mr. Hilger: Where are we now?

The Court: I do not know what the materiality is.

Mr. Castro: Mr. Hilger was questioning him about it on page 14, on this very matter that I brought out to the Court.

The Court: I understand that, but I just do not quite understand what this witness has got to do

(Testimony of Russell M. Stearns.)

with that. He was merely a spectator at the deposition.

Mr. Castro: Yes, but the document was given to him for the specific purpose of bringing it to San Francisco to get the supporting data for each of the items listed in there.

The Court: And that supporting data has already been produced.

Mr. Castro: That is correct. And now, the witness Bertain used this memorandum in his testimony at one point, and [586] page 14, and as I have indicated to the Court, he identifies factory cuts as being the only items which were shipped to the Eureka Lumber Company, the other items being shipped to customers of the Eureka Lumber Company. In other words, possession was not given to Eureka Lumber Company, and without this record, your Honor, it is unintelligible as to what those items are.

The Court: I can see how the record might be introduced in evidence, but I do not see what this witness' testimony has to do with it. He is only an accountant. I am not saying that disparagingly, but he has no first hand knowledge of the transactions themselves.

Mr. Castro: No, I only laid the foundation with him that this was the document which was referred to in the deposition of Mr. Bertain.

Mr. Hilger: Was what?

The Court: We are taking up a lot of time that I think is inconsequential.

(Testimony of Russell M. Stearns.)

Mr. Hilger: It is immaterial, incompetent, hearsay, it is not the document that was presented to Mr. Bertain, it has all sorts of notations over it, and Mr. Bertain was allowed to use the document only to refresh his independent recollection. The invoices reflected on the document are already in evidence. This is not the best evidence of them, and I will stand on those objections. [587]

The Court: If the invoices are already in evidence, then you have the direct evidence concerning which the witness testified.

Mr. Castro: The witness Bertain testified, your Honor, that the items listed here other than factory cuts were shipped to the customers.

The Court: But that testimony is already in the record.

Mr. Hilger: Not from this document but from his recollection.

Mr. Castro: You are referring to the memorandum in the question. There is no doubt about it. Here is what we are dealing with at this time, your Honor.

Mr. Hilger: Beginning at page 4, clear through to pages 8 or 9, when Mr. Bertain finally refreshed his recollection, he referred to it, but then he testified from his recollection.

The Court: This testimony, Mr. Castro, is already in the record.

Mr. Castro: Yes, but it does not mean anything because we do not know what the memorandum is he is testifying from.

(Testimony of Russell M. Stearns.)

The Court: It doesn't make any difference because the invoices themselves are in evidence and they show where the merchandise was shipped.

Mr. Castro: No, not necessarily. [588]

The Court: I understood they did. Where are they? I thought they did. At any rate, this witness' testimony would be hearsay. He had to ask what the facts were.

Mr. Castro: He is the man who sold the lumber.

The Court: I am talking about the witness. The witness knows only what somebody told him.

Mr. Castro: Mr. Stearns' testimony is only for the purpose of identifying the memorandum which was given to him.

The Court: All right. You have established by the witness' testimony that he wrote the notations in pencil on that.

Mr. Castro: That is correct.

The Court: There still remains the question of the admissibility of the document in evidence, which has nothing to do with this witness' testimony. If it is not admissible, there is nothing this witness can say that will make it admissible. He is testifying from hearsay.

Mr. Hilger: It is not the best evidence.

Mr. Castro: He has established that this is the memorandum he used to refresh Bertain's recollection at the time of this deposition.

The Court: I would strike that out because he is not competent. He is not the official reporter. That is not disclosed in the record. An outsider cannot

(Testimony of Russell M. Stearns.)

testify as to how [589] a witness testified in a proceeding that was reported by a reporter, in accordance with the rules.

Mr. Castro: Then it is my fault that it was not identified, your Honor, because it was turned over to the witness at the conclusion of that testimony.

The Court: I do not see any criticism of you involved in it. All I am pointing out is that you cannot introduce a document in evidence merely by reason of the fact that the witness has testified that he received the document and put some writing on it. That does not make it admissible.

Mr. Castro: May I ask him one further question?

Q. Is Exhibit M the document which Mr. Bertain was using in refreshing his memory at the time this deposition was taken on September 18th?

Mr. Hilger: Objection.

A. Yes.

The Court: I will sustain the objection. This witness is not competent to testify to that.

Q. (By Mr. Castro): In reviewing the records of the Redwood Lumber Company did you find that certain moneys were placed in an account for Harold Dee Jensen?

Mr. Hilger: I object to that as incompetent, irrelevant and immaterial at this stage of the proceedings.

Mr. Castro: That is a preliminary question, your Honor. It goes to invoices and that is all. [590]

A. Yes.

(Testimony of Russell M. Stearns.)

The Court: Just a moment. Will you please read that question.

(Question read.)

The Court: For Harold or of Harold?

Q. (By Mr. Castro): Did you find in your review of the books that there was a bank account in the name of Harold Dee Jensen in which moneys from the Eureka Lumber Company records showed deposits in that bank account? A. I did.

Mr. Hilger: I object to it as immaterial at this stage of the proceeding.

The Court: There was some testimony on that already, wasn't there? I think Mr. Jensen testified he put money into it.

Mr. Hilger: Certainly, he testified to that fact and I believe it to be the fact. It is immaterial.

The Court: Mr. Jensen testified he put money into his son's account; am I correct about that?

Mr. Castro: That is correct, your Honor.

The Court: What do you want to ask him about it for?

Mr. Castro: The next question I would ask him is whether he asked for invoices to show purchases of lumber reflecting the amounts of those deposits.

The Court: Whether he asked for? [591]

Mr. Castro: That is correct.

The Court: I will allow it.

Mr. Castro: Thank you.

Q. Do you understand that question, Mr. Stearns?

A. Yes.

Q. Did you see the records of moneys being

(Testimony of Russell M. Stearns.)

transferred from the Eureka Lumber Company to the Harold Dee Jensen account?

The Court: That is not what you asked him. You asked him whether or not he was asked for invoices showing purchases by Harold Dee Jensen. I have allowed that question and he can answer that.

Mr. Castro: Do you understand the question?

A. I did.

Q. Whom did you ask for those invoices?

A. Mr. Hilger.

Q. Have you been given any such invoices up to the present time? A. No, sir.

Q. Did you find any invoices in the records you saw to support purchases of lumber in the amounts of money that were deposited into the Harold Dee Jensen account? A. I did not.

Q. During the calendar year 1956, through the time of the fire, did you find any payroll record reflecting that [592] Harold Dee Jensen was on the payroll of the Eureka Lumber Company during the six months before the fire? A. No, sir.

Q. Did you find any payroll record reflecting whether during the first six months of 1956 there was any withholding tax or social security withholding for Harold Dee Jensen on the payroll?

A. No, sir.

Q. In reviewing the records of the Eureka Lumber Company did you look for the fact as to whether or not there were any overdrafts? A. I did.

Mr. Hilger: I will object to that.

(Testimony of Russell M. Stearns.)

The Court: Sustained.

Mr. Castro: The following questions, your Honor, go to that question of financial responsibility, so I would have to make an offer of proof because I understand what your Honor's rulings are.

The Court: I take it you want the witness to testified as to what he found to be the financial condition of the plaintiff?

Mr. Castro: That is correct.

The Court: I assume they cover that field. I will sustain an objection to it.

Q. (By Mr. Castro): With reference to Plaintiff's Exhibit 18, a financial statement given to the [593] Anglo California Bank on June 14th, 1956, have you reviewed that financial statement?

A. Yes.

Q. Have you reviewed that financial statement with specific reference to accounts payable?

A. Yes.

Q. Does that exhibit correctly state the accounts payable as of the date in June?

Mr. Hilger: I will object to that. It calls for a conclusion based upon an examination I do not think it was possible for him to make. He has already indicated that he has not had access or the records of 1956 in June have not been available to him for his examination. He has had no information as to the manner of record keeping, whether it is cash, accrual, or what inventory items were considered in transit and what were not. I think all he can tell us is what accounts payable he might

(Testimony of Russell M. Stearns.)

have ascertained actually existed, but as to the correctness of the documents, I think it would call for a conclusion on which he could not possibly have the basis for a valid opinion, even in view of his own testimony that he has been unable to examine the records.

The Court: I am going to curtail the examination as to financial standing. I see no relevancy of it in this case.

Mr. Castro: Again there would be an offer of proof.

The Court: Otherwise we would go into a long [594] examination here that might take a long time as to the correctness of the financial statements that the plaintiff made to the bank. We have no concern with that here.

Mr. Castro: That is in evidence on behalf of the plaintiff over our objection, your Honor, and it goes for the truth of the fact.

The Court: It came in in connection with some testimony, not to show financial standing, but, as I recall—this record has not been written up?

Mr. Castro: No, it has not, your Honor. It came in for all purposes. I did not hear any limitation at the time.

Mr. Hilger: It came in because of the issues raised by counsel in his opening statement, which he has been unable to meet so far on the basis of the evidence.

The Court: If that is the case then I will enter-

(Testimony of Russell M. Stearns.)

tain a motion to strike out the financial statements from the record.

Mr. Hilger: Then we will move to strike it out. It was not a statement rendered to the insurance carrier and they have nothing to do with its correctness one way or the other. It goes to an issue that was raised by counsel in its opening statement but which has not developed in the trial of the matter, and therefore it would be irrelevant.

The Court: The Court admitted them on behalf of the plaintiff.

Mr. Castro: I did not offer them in evidence.

The Court: I say the Court admitted them [595] on behalf of the plaintiff.

Mr. Castro: That is correct.

The Court: In view of the fact that you had made an opening statement in which you had made certain statements, and I ruled, although it was strictly in the sense of rebuttal, I would allow them in as statements on the theory that the Court had control over the order of proof. Since there has been no foundation laid to consider the question of financial condition, on the motion of either side, I would strike the financial statements from the record.

Mr. Hilger: In the present state of the record it relates to no issue raised here and I would move to strike it out since we offered it.

The Court: Both financial statements may be stricken, 17 and 18.

(Testimony of Russell M. Stearns.)

(Thereupon Plaintiff's Exhibits 17 and 18 were withdrawn from evidence.)

Mr. Castro: If the Court please, those are all the questions I have at this time.

The Court: Very well.

Cross Examination

Q. (By Mr. Hilger): Mr. Stearns, has it not been your experience in your work as a Certified Public Accountant that a physical inventory is [596] much more trustworthy as to accuracy than a derived book inventory? A. Yes.

Q. You have made reference to the fact that certain records were not inspected by you. You have never seen those records, have you, and you were told upon each occasion that Mr. Hyrum Jensen and myself—I think I did most of the talking with you, didn't I? A. Yes.

Q. We did not know where those were except as to, I believe, an accounts receivable ledger and possibly a sales register? A. Yes.

Q. And you were told upon all occasions that all the records, the whereabouts of which we knew, either were already available to you or would be made available, is that not so?

A. That is what you said.

Q. You came up on October 4th for your first examination of various records and noted by correspondence intervening between a period and the second period that you would be up sometime in January, is that correct? A. Yes.

(Testimony of Russell M. Stearns.)

Q. You received a letter from me dated December 4, 1956, did you not? A. Yes.

Q. And you were told in that letter that [597] Mr. Harold Dee Jensen had been able to make certain reconstructions of the accounts receivable; isn't that the content of that letter?

A. By inference.

Q. And a rather reasonable inference, too, Mr. Stearns, wasn't it, that that is what I meant in that letter?

A. You said in the letter that you had told me that you would obtain from Harold Dee Jensen, if possible, and as soon as possible, the information he had been able to develop by way of the reconstruction of the records referred to.

The next paragraph, "I have in my possession and at your disposal the items referred to and they are available for such inspection at your convenience."

Q. Then you came up in January to inspect them, is that correct? A. That is right.

Q. On that occasion you went through such of these papers here as you considered relevant, and you found in addition a ledger book with a reconstruction of a list of accounts receivable, is that right?

A. It did not say "Accounts Receivable."

Q. Wouldn't you consider that an accounts receivable sheet based on your experience?

A. It is a list of names with some addresses and some amounts.

(Testimony of Russell M. Stearns.)

Q. And some notations of "Paid," "Paid," "Paid," "Paid." [598] A. Right.

Q. You came up in January, and at that time all of these papers that are here now were again made available to you, in addition to what we had been able to obtain as evidenced by the Exhibit No. AW, to which you have just referred, and you looked all those over again or such as you chose to look at? A. That is right.

Q. You came up again in December, did you not? I am sorry. September of this year?

A. Yes.

Q. That was not by prearrangement with my office, was it? That was upon the occasion of some depositions being taken and you accompanied Mr. Castro? A. That is right.

Q. And you went through this box of material again, particularly this part here. Do you recall asking me to look at this register here (indicating)?

A. Yes.

Q. At my office. You said you found no payroll material showing Harold Dee Jensen on the payroll of the Eureka Lumber Company in your testimony?

A. In—

Mr. Castro: The calendar year 1956. That was the testimony.

Q. (By Mr. Hilger): And did you see these [599] withholding statements covering the earnings and withholdings of Harold Dee Jensen made by Hyrum Jensen doing business as Eureka Lumber Company covering the calendar year 1955?

(Testimony of Russell M. Stearns.)

A. I did.

Q. It is not usual or normal to prepare these W-2 forms until the conclusion of the calendar year, is it, Mr. Stearns? A. No.

Q. And the calendar year 1956 had not been completed when you were marking your examinations up there, had it? A. No.

Q. You have seen a copy of Mr. Harold Dee Jensen's 1955 tax return, haven't you?

Mr. Castro: There is no examination on 1955, your Honor.

Mr. Hilger: This is a Federal Court and we can examine on any point that is relevant.

Mr. Castro: We submit that the direct examination was limited to 1956.

The Court: I think it is proper cross examination. There is some import to the testimony that there was no tax returns or withholding statements made, and I think it is within the realm of proper cross examination. I will allow it.

Q. (By Mr. Hilger): You have seen a photostatic copy of the 1955 tax return of Harold Dee Jensen, have you not? A. Yes. [600]

Q. And it showed nothing but wages from the Eureka Lumber Company with the proper withholding offset against it, isn't that true?

A. True.

Q. It showed not one dime of participation in the net income of the Eureka Lumber Company, isn't that true? A. Yes.

Q. And you have seen copies of the 1955 tax re-

(Testimony of Russell M. Stearns.)

turn of Hyrum Jensen and his wife, have you not?

Yes or no. A. I saw copies.

Q. Yes.

A. I don't know for sure they were filed.

Mr. Hilger: Mr. Castro, have you been able to obtain from the Internal Revenue Service a copy of the 1955 income tax return requested and which we authorized you to obtain?

Mr. Castro: I do not believe I have. I have given you whatever I obtained.

Mr. Hilger: Let us check the file and see.

Q. I do not see 1954, but you have seen 1955, a copy, have you not?

A. I have seen a copy in the file. I do not know whether it was filed.

Mr. Hilger: There was a copy marked for identification here by the defendant.

The Court: Defendant's Exhibit I. [601]

Q. (By Mr. Hilger): That is a copy that you saw, is it not? A. I believe so.

Q. And that was found among the records of the Eureka Lumber Company in the course of your examination for Boston Insurance?

A. That is right.

Q. That shows for the calendar year 1955 \$530,605.33 in sales, doesn't it? A. Yes.

Q. And it shows a net profit of \$19,732.12?

A. Right.

Q. And not one thin dime of that is allocated as being taxable to anyone but Hyrum D. Jensen, is it? A. Not here.

(Testimony of Russell M. Stearns.)

Q. You have referred to a list of checks for moneys deposited in the account of Harold Dee Jensen. You referred to such a list of transactions, haven't you, Mr. Stearns? A. Yes.

Q. Did you ever provide me with that list?

A. No.

Q. How then can you say you asked for invoices covering a list of transactions you did not give me?

A. The cash books showed the record.

Q. The cash book shows the entire transactions for the year? [602] A. 1956?

Q. Whatever year it purports to record.

A. I asked for the invoices supporting the purchases that were shown paid for to H. D. Jensen, per the cash book, which is right over there.

Q. And you have provided me with no list of transactions to which you had reference?

A. It is right in the cash book.

Q. I ask you if you had provided me with a list.

A. No.

Q. When did you make this demand?

A. In October.

Q. Were you told that you had all available invoices and that any that showed up thereafter would be made available to you at that time?

A. I was.

Mr. Hilger: That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Stearns, are you ac-

(Testimony of Russell M. Stearns.)

quainted with Mr. Frederick Hilger as a Certified Public Accountant? A. Yes, sir.

Q. And he practiced as a Certified Public Accountant over a period of years, did he not, with the firm of Skinner and Hammond? [603]

A. Yes, sir.

Q. And the cash register that you have referred to is this volume? A. Yes, sir.

Q. You told him that you wanted the supporting invoices for the transactions with H. D. or Harold Dee Jensen reflected in this cash book?

A. I did.

Mr. Castro: I offer the book in evidence as Defendant's Exhibit next in order.

(The book referred to was thereupon received in evidence and marked Defendant's Exhibit AX.)

Q. (By Mr. Castro): During the calendar year 1955 were you able to ascertain how moneys were paid to Harold Dee Jensen? A. Yes.

Q. How was the account headed in the book or whatever you saw?

Mr. Hilger: What are we returning to now?

Mr. Castro: The moneys you questioned him about for 1955.

The Witness: As drawings.

Q. (By Mr. Castro): Referring to the 1955 copy of the tax return Exhibit I, does that tax return show the year ending inventory as of December 31, 1955? [604] A. Yes.

(Testimony of Russell M. Stearns.)

Q. What is the amount of that ending inventory?

Mr. Hilger: We will object to that as immaterial as to the value or the existence of any inventory six and a half or seven months later.

Mr. Castro: That is only the starting point from which the accountant can go.

The Court: It is some evidence. Overruled.

A. \$15,478.11.

Q. (By Mr. Castro): Referring to the financial statement, which is Exhibit 18, formerly in the case, what does it show the inventory was as of June 1, 1956? A. \$28,080.

Q. And that financial statement was executed under what date according to the document?

A. June 14th, 1956.

Mr. Castro: I offer that document in evidence for the specific purpose of referring to the inventory.

The Court: I will allow it for that purpose.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AY.)

The Court: That was originally 18.

Q. (By Mr. Castro): Now, either from the tax return or from that financial statement were you able to ascertain how much of that inventory was hardware merchandise as distinguished [605] from redwood molding, as distinguished from 2x4's and other material which were in the outside yard?

A. No.

(Testimony of Russell M. Stearns.)

Q. How was the only way that you could get that information? What are you dependent upon for that information?

A. A physical count of the inventory December 31, 1955.

Q. I believe you have already testified you asked for the invoices to support two particular inventories, that is, the inventory as of the end of December, 1955, and as of June, 1956. A. Yes.

Mr. Castro: Those are all the questions I have.

The Court: Anything else of the witness?

Mr. Hilger: Nothing, your Honor.

The Court: That is all, sir. We will take the morning recess.

(Witness excused.)

(Recess.)

Mr. Castro: With reference to the accounts receivable book, your Honor, I would like to read from page 24 of

HAROLD DEE JENSEN'S DEPOSITION
line 4:

"Q. Who had charge of those books at the time of the fire? "A. Mrs. Van Harpen.

"Q. How long had she been in charge of the books?

"A. I think she had been there about a year, as near as I remember. [606]

"Q. You say the accounts receivable book was upstairs at the time of the fire?

"A. Yes, for the retail.

(Deposition of Harold Dee Jensen.)

“Q. Had you seen it upstairs that morning?

“A. Yes.

“Q. Had you brought it upstairs?

“A. Yes, I took it up there.

“Q. And where did you see it upstairs?

“A. It was on my desk.

“Q. Did you see it after the fire?

“A. Yes.

“Q. Where did you see it?

“A. Still on my desk.

“Q. And did you remove it? “A. Yes.

“Q. Where did you take it?

“A. I don’t recall exactly. We went through it and reconstructed as much as possible out of it.

“Q. What did you do with that book?

“A. It was given to Mr. Hilger, and what was this other fellow’s name?

“Mr. Hilger: I believe you are in error there.

“Mr. Castro: Let the witness testify from his recollection, counsel. [607]

“Mr. Hilger: Well, he asked me a question.

“Mr. Castro: He asked you a name. You can either give him a name or tell you don’t know. You don’t have to advise him of something else.

“The Witness: I don’t recall exactly on it.

“Q. (By Mr. Castro): Where did you find the accounts receivable book after the fire?

“A. On my desk in the upper office.

“Q. Was it open or closed?

“A. I don’t recall.

“Q. Was anybody with you when you picked

(Deposition of Harold Dee Jensen.)

it up? "A. Yes.

"Q. Who?

"A. There were several firemen.

"Q. Anybody else?

"A. There were others around.

"Q. Could you identify any of them?

"A. No, I can't.

"Q. This was in the office upstairs?

"A. Yes.

"Q. How many people were up there?

"A. I would say half a dozen.

"Q. Now, can you identify any of the people that weren't firemen? [608]

"A. That weren't firemen?

"Q. Yes.

"A. No, I can't, because some of them were volunteer firemen.

"Q. Did you show the accounts receivable book to any of them? "A. I don't recall.

"Q. Then what did you do with the book after you picked it up from the desk?

"A. Oh, I tried to reconstruct it as much as possible.

"Q. Where did you take it?

"A. I don't recall.

"Q. Did you take it out of the building?

"A. Yes, I took it out of the building.

"Q. And then where did you take it?

"A. I don't recall.

"Q. Where is the last place you saw the accounts receivable book? "A. 2434 E Street.

(Deposition of Harold Dee Jensen.)

“Q. And when was that, approximately?

“A. It was sometime after the fire.

“Q. About how long after the fire?

“A. Approximately a month. [609]

“Q. Was that the last time you saw that accounts receivable book?

“A. Yes, as near as I can recall.”

Mr. Castro: At this time counsel agreed to stipulate concerning the two electric motors which are on page 5 of the inventory, your Honor. Will it be stipulated, Mr. Hilger, that the two electric motors, valued at \$600 and \$700, respectively, at page 5 of the inventory, Schedule A, were from the Hill and Morton, Inc., and that following the fire on August 31, 1956, the Hill and Morton Company originated a claim for each of such motors with its insurance carrier for such motors, and the insurance carrier for such motors was the American National Fire Insurance Company, and on another date, February 25th, 1957, a proof of loss was received from Hill and Morton by the American National Fire Insurance Company in the amount of loss and damage of \$1,130 and it was paid under a draft paid February 19, 1957, to Hill and Morton and Bank of America National Trust and Savings Association in the amount of \$1,130, being Policy No. 151093. The other item which was involved with the two motors was a planer, and the planer was not damaged in the fire.

Mr. Hilger: Nor was it included on a proof of

loss filed with the Boston Insurance Company herein.

Mr. Castro: That is correct, but the two motors were.

Mr. Hilger: That would be the testimony of [610] Hill and Morton if called. I will so stipulate.

Mr. Castro: That, I believe, your Honor, concludes the evidence on behalf of the defendant. Mr. Driscoll apparently has not called back concerning the Eureka Redwood invoices. If they should turn up before they start arguing the case, we will ask that it be made available.

The Court: Any rebuttal testimony?

Mr. Hilger: Yes, your Honor, unfortunately. I do not like to do this but I think I am going to have to either testify or have my testimony stipulated to concerning certain records connected with Mr. Stearns' examination and in connection with the inventory as revealed on the financial statement that has been introduced in evidence, for the purpose of establishing inventory.

The Court: Of course, if you testify you would not be able to argue that part of the case that has to do with your testimony. Can you make some statement of what you wish to testify to?

Mr. Hilger: Simply that I have no recollection of any demand being made for the production of invoices relating to the cash disbursements shown to the account of Harold Dee Jensen, nor that I have knowledge that such a list was even or had been prepared by Mr. Stearns except through the members of my office staff, who observed Mr. Bre-

dal of his office handling those checks. My recollection is that on September 18th or 19th [611] was the first reference made to the cash book in my office.

Likewise the financial statement of June 1st, 1956, reflected only inventory that was in the building, the retail stock, so to speak. The wholesale operation was conducted on a carload basis, and the items were handled accounting-wise as in transit items, the goods being held only for a few days in the yard of the Eureka Lumber Company where they were either resorted, regraded, or reclassified and then shipped out with settlement, the purchase and the sale of the lumber being made through one invoice through the office of Hill and Morton or otherwise; that on the books of record in the usual wholesale instance neither the inventory nor the accounts payable covering that inventory would ordinarily be reflected upon the books of account of the Eureka Lumber Company prior to the time of the fire and would not appear until the sale was recorded and disbursement made.

The Court: That would be the substance of your testimony?

Mr. Hilger: That is correct.

Mr. Castro: Since Mr. Hilger was not the accountant for the firm or taking care of the books, I cannot accept any such statement, your Honor.

The Court: I think you are right about that. You did make some statement about his recollection of demand being made. [612]

Mr. Castro: He said he had no personal recol-

lection of Mr. Stearns asking him for a specific record relating to H. D. Jensen. It could possibly have occurred when Mr. Bredal, who is the other party——

Mr. Hilger: Mr. Thomas of my office accompanied Mr. Bredal and Mr. Stearns through the Eureka Lumber Company plant upon the occasion of their visit in October. I have no recollection at all of even a list of cash disbursements to Harold Dee Jensen being prepared. It was certainly not revealed to me until I discovered it through the observation of some of my office staff, who saw them do it, which revelation was made to me only after they had departed. I have no recollection of any such request being made of me.

Mr. Castro: Can you give us the approximate date when you discovered the account of Harold Dee Jensen?

Mr. Hilger: It would have been some three or four weeks after, whenever we got the transcribed portion or, rather, the transcribed record of Mr. Hyrum Jensen's examination under oath.

Mr. Castro: Will you stipulate that that occurred during the month of November, 1956?

Mr. Hilger: I could not stipulate to that. It would be somewhere at about that time that I first became aware that Mr. Stearns had even made such a list, and I was at that time totally unaware of any request. It would be about the 6th day [613] of December when I got around to read that. It would have been the 10th or 11th of November. But at that time I was still aware of only one thing:

Mr. Bredal had been observed making a list of certain disbursements. But I was aware of no requests for invoices covering it.

Mr. Castro: We will stipulate, your Honor, that Mr. Hilger, if called as a witness for the plaintiff in this case, would testify that he has no recollection as to whether or not Mr. Stearns made a specific request for invoices relating to moneys which were on deposit in the Harold Dee Jensen account; that subsequently after the visit of Mr. Stearns in October, 3rd, 4th or 5th, 1956, Mr. Hilger was informed by Mr. Thomas of his office that certain notations had been made concerning Harold Dee Jensen's deposits, and that Mr. Hilger did not learn any more about them until after he received the examination under oath, which was on or about November 6th, 1956.

Mr. Hilger: On or a few days after November 5th or 6th, 1956, was the first time I became aware that a series of notations had been made.

Mr. Castro: So stipulated, your Honor.

The Court: Very well. But the other part of your offer, Mr. Hilger, I think counsel is right about that.

Mr. Hilger: It comes from discussion actually with Mr. Harold Dee Jensen, who did discover the records during its lifetime. [614]

The Court: I think that would be inadmissible. That would be all you would have then by way of rebuttal?

Mr. Hilger: Yes, your Honor.

The Court: The evidence having been concluded,

I think I shall excuse the jury until tomorrow morning because there are some legal matters I want to discuss with counsel and you will want some time to prepare what you want to say to the jury. This is a difficult enough case anyhow for the jury to follow, I think there should be some thought given to the manner in which it should be presented to the jury. So I think it would be better that the jury be excused until tomorrow morning. You could not conclude the case so far as submission to the jury is concerned to the jury today anyhow. I think it would be more adequately handled from the point of view of presenting it to the jury if you had the jury for longer than this afternoon. So will you come back tomorrow morning until 10:00 o'clock. The Court will remain in session.

(The jury was thereupon excused.)

(The following occurred in the absence of the jury:)

The Court: If you do not mind, gentlemen, we might take these matters up now and save your coming back again this afternoon. That will give you an opportunity to spend your time in the afternoon preparing what matters you wish to present. The main thing is the question of instructions the Court should give the jury in this case. [615]

Mr. Castro: Your Honor, I would like to make a motion for a directed verdict at this time in regard to certain matters.

The Court: I will hear you on that.

Mr. Castro: At this time the defendant Boston Insurance Company moves the Court to direct a

verdict in favor of the defendant Boston Insurance Company upon the grounds that the uncontradicted evidence establishes that the plaintiff has not complied with the conditions of the policy concerning what an insured is required to do after a fire has occurred and the loss has been sustained. In this instance I point out to the Court the policy provisions are under Insurance Code 2071, the Insurance Code of the State of California, and under the clause of the policy relating to requirements in case loss occurs, the language there is mandatory. The word "shall" is used, and the insured is required to produce books of account and is required to produce bills, statements, invoices and other vouchers relating to the items listed in the proof of loss, and if the original documents are destroyed, he is required to produce copies at such reasonable time and place as may be designated to permit the defendant to make abstracts therefrom.

(Counsel for the respective parties argued the merits of the motion, afterwards the Court made the following ruling:)

The Court: I will deny the motion for a directed verdict. [616]

Mr. Castro: The other motion I had in mind, your Honor, would relate to specific items in the inventory which perhaps your Honor is going to discuss at the time of talking about the instructions.

(Thereupon Counsel for the respective parties proceeded to discuss with the Court the instructions to be given to the jury.) [617]

Tuesday, October 1, 1957—10:00 A.M.

(Counsel for the respective parties thereupon proceeded to argue the case to the jury, afterwards the Court instructed the jury as follows:)

INSTRUCTIONS TO THE JURY

The Court: Members of the jury, I will ask you to give me your attention for a few moments. Some of you are new to jury duty. A few of you have had some prior experience, and there are some general observations that I would like to make to you concerning this case, some of which are applicable to all cases and some of which particularly apply to this case. It is very obvious to me that you have given your undivided attention to the evidence that has been presented here and to the arguments of the attorneys. To some of you this has been somewhat of a unique experience for the first time of jury duty to be confronted with a case that might appear at first blush to be somewhat complicated, but which, like all cases, finally resolves itself down to some outstanding issues that you can well determine.

The function of the jury in a case of this kind, as it is in all cases, is to determine the question of fact that is presented and the question of fact in this case is should the plaintiff recover from the insurance company, and if so, how much. The Judge ordinarily does not interfere or [618] assume any prerogative of deciding that question of fact. That is for the jury exclusively to determine. You are

not to draw any conclusions from anything I may have said during the course of the trial in ruling on objections or in connection with propounding inquiries myself that I was intending to indicate to you in any way what your verdict should be. Such was not the intention of the Court. Whatever was said in that regard was only for the purpose of supervising the trial of the case, and, if possible, to expedite it. You must make your own decision on the factual question.

Just as you have sole and exclusive function of determining the facts in the case, so it is exclusively the function of the Judge to advise the jury as to what the law is that is applicable to the case, so that the jury may be aided thereby in determining the question of fact which the jury has to determine, and the statement of law as the Judge gives it to you, you must accept. You have to assume, rightly or wrongly, that the Judge knows what he is talking about when he tells you what the law is, and you must apply it to the facts of the case. I mention that to you because it sometimes happens that jurors come into the jury box with some preconceived notions about social, economic or legal theories and they decide what they think the law should be and then proceed to decide the case accordingly. That is wrong, and that is why I have to emphasize to you that so far as the statement of [619] law is concerned, you are bound by what the Court tells you the law is.

Even though we have somewhat different functions to perform, you deciding the questions of fact

that are presented and the Judge giving you the law here, we are nevertheless in a sense a team because our objective is the same, that is, we want to see justice done and that a just result shall obtain in the case before the Court.

In your deliberations in determining this case you should wholly exclude all matters that appeal to your sympathy and likewise anything that might possibly appeal to your prejudices. You must not decide the case because you have sympathy for one side or the other or prejudice of some kind against one side or the other. You must decide the case solely on the basis of the evidence you have heard here in this case.

There are some general rules that apply in all civil cases, and I am going to very colloquially and simply give them to you. I rarely in the many years I have been here read complicated and long legal statements to juries. Some do that. I do not quarrel with that system. They have a right to do that. But I feel that when we draw into our jury boxes men and women from all walks of life, they should be told about the applicable law in language that they ordinarily use and not in the language of the law books, which, I may say to you, Judges themselves are frequently in dispute about. So [620] what I have to say to you in this field may hereafter not read as well as the instructions in a case of those who read long, written statements to you, but I have an abiding conviction that juries better understand it and can better do justice if they are advised in the language that we ordinarily use, because it

cannot be expected that twelve men and women can be brought into a jury box in a case and suddenly by some divine inspiration in 15 or 20 minutes or a half hour be inoculated with a complete knowledge of the law appertaining to the case. That is just impossible.

Whether or not you believe the witnesses who have testified in this case and the extent to which you believe them is a matter for your sole and exclusive judgment, and the amount of weight to be attached to the testimony of the witnesses is something that you yourself have the exclusive power to decide. We always start out with the presumption in every case that when a witness comes up and sits in this chair he or she is going to tell the truth. However, that presumption can be put out of the way and disappear by a number of different factors. You may consider the witness' demeanor on the witness stand, the manner of testifying of the witness, whether or not the witness contradicts himself, whether or not he is contradicted by the testimony of another witness, and what his interest in the case may or may not be. All of those factors you can take into account when you evaluate how much weight you want to give to the testimony of the witness, [621] so that you can determine whether or not, when the witness leaves the stand, he is still clothed with that presumption that he had when he got in the witness chair, namely, that he was going to tell the truth. If you find and conclude that some witness testified falsely in some material respect, you have the right to, and you are justified in dis-

regarding all of the witness' testimony. You should not, however, resort to that unless you are satisfied that the falsity was in some material matter that definitely affects the outcome of the case.

This is a civil case. It is a suit brought by the plaintiff, who was insured under an insurance policy by the Boston Insurance Company, and he is suing here because he claims that under the terms of the policy of insurance which he paid for that he had a loss by fire which is compensable under the terms of the policy, and he has filed a claim with the insurance company for the amount of the loss which he claims he suffered by fire, and not having been paid that amount he has filed suit. So it is for your determination in this civil action whether or not he shall recover, and, if so, to what extent.

In every civil case the burden of proof is upon the plaintiff. He must prove his case by a preponderance of the evidence, the law says. By that we mean that the evidence on his side, when weighed with the evidence on the other side, [622] must have more convincing weight and effect, and if it does have more weight and convincing effect than the evidence on the other side, then the plaintiff has sustained the burden of proving his case by a preponderance of the evidence. Otherwise he has not. That does not mean that the man who has the biggest number of witnesses has the preponderance of the evidence, because preponderance of evidence does not depend upon the number of witnesses. It depends upon the quality of the testimony. It might well be that in a case in which there is only

one witness on one side and 30 witnesses on the other side the testimony of the one witness might have more convincing weight and effect than the testimony of the 30 witnesses on the other side of the case. So I repeat to you in determining the matter of preponderance of evidence you should judge by the quality of the testimony rather than by the quantity of it.

It is your duty in this case as in all civil cases—in fact in all cases—to disregard any testimony that has been stricken out by the Court or any answer to a question where the Court has sustained an objection to the question. You should only consider the evidence that has actually been produced here by the witnesses, from the mouths of witnesses, exhibits, plus any stipulations that counsel have made as to facts in the case, and a stipulation has the same effect as if it were testimony given. [623]

The attorneys in this case, as is their right and indeed their duty, have argued the case to you. If, however, you should feel that there is any discrepancy between the statement of the evidence as made by the attorneys and the evidence as you recall it as having been given by the witness, then you should disregard the statement of the evidence as made by the attorneys and only consider the evidence as you recall it as having come from the mouths of the witnesses or by other evidence.

As I have stated to you members of the jury, this is a case of a suit on an insurance policy. As presented here there are several different questions that have been tendered by the pleadings, which are

the written documents that the parties have filed in the case, and also by arguments of the attorneys, too. I would say to you that the main issues that were tendered in this case are, What was the amount of the stock on hand of the plaintiff at the time of the fire? What was the extent of the damage by fire? What was the cash value in dollars of the loss sustained? Did the plaintiff debar himself from recovery because of any deliberate or purposeful exaggeration or over-statement of his claim to the insurance company? And should the jury consider the claim of the insurance company that the plaintiff debarred himself from recovery by allegedly setting or conspiring to set the fire that caused the damage in this case? [624]

Now, members of the jury, the amount of the stock of merchandise on hand at the time of the fire in this case is in dispute. I mean by that that one side has claimed one certain amount and the other side has disputed that and claimed that there was a different amount on hand. The plaintiff claims that he had stock on hand that was worth considerably more than the maximum amount of the policy, which was \$20,000. The defendant claims that the plaintiff falsified the amount of merchandise on hand, particularly redwood lumber in the shed, with the intent to defraud the insurance company. The jury must resolve this issue and, as best it can from the evidence, determine the amount on hand and the cash value of the alleged damaged stock. If the jury should find from the evidence that the plaintiff purposefully and deliberately padded or exagger-

ated his claim to a material extent in order to cheat or defraud the insurance company, the plaintiff cannot recover, but any difference between the amount claimed and the actual amount of the inventory, if there be such a difference, cannot be considered as the basis for debarring recovery if such differences are the result of honest evaluation or based upon conflicting or differing opinions as to the amount and value. The burden of proving any alleged willful or fraudulent padding of his claim by the plaintiff rests upon the defendant.

In determining the loss or damage to the sawmill which you have heard about, and which the lawyers have talked [625] to you about, which the plaintiff claims to be \$7,500, being the amount for which the plaintiff claims to have sold the sawmill, the defendant a much smaller sum, the jury is entitled to consider the cash value of the sawmill at the time of the fire not exceeding the cost of repair or replacement with material of like kind and quality within a reasonable time after the fire. The cash value of the sawmill may legally be considered to be the price at which the mill had been sold by the plaintiff.

The defendant claims that the plaintiff has not complied with the policy of insurance by not producing all of the records which the defendant demanded, and thereby has debarred himself from recovery in this action. Whether or not the plaintiff has so complied with the policy is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence. If you find that

the plaintiff substantially and willfully failed to produce material records within his power to produce, then you may find for the defendant; otherwise not. Stated somewhat differently and on the other side, as it were, you should not find in favor of the defendant on this issue unless you are convinced by a preponderance of evidence that the plaintiff willfully failed to produce records which were material to his claim of loss and within his power to produce. The defendant has the burden of proving such failure on the part of the plaintiff. I mean [626] by that the defendant has the burden of proving that the plaintiff has substantially and willfully failed to produce records within his power to produce.

The defendant has urged as a special defense in the pleadings on file here that the plaintiff set or conspired to set the fire. This charge was made in writing in defendant's answer and was urged by defendant's counsel in his opening statement to you at the beginning of the trial. Ladies and gentlemen, this is a serious charge and amounts to charging the plaintiff with the commission of a crime, to wit, a felony. Such a serious charge should not lightly be made. I instruct you that as a matter of law the defendant has failed to present any substantial evidence to sustain such a charge, nor is there any substantial evidence from which an inference as to the truth of such charge can be drawn. Therefore it is my instruction to you to disregard the claim of the insurance company in this regard, and you should not consider it in any way in determining the issues in this case.

Members of the jury, if you decide that the plaintiff should recover and is not debarred from recovery by reason of the application of any of the other principles of law which I have given you, then you will determine from all the evidence the amount to be awarded to the plaintiff, not exceeding the principal amount of \$20,000 which was the amount of the insurance policy. [627]

Members of the jury, I think I have given you as much advice as I think in this particular case is appropriate and needful for you to have in resolving this case. There are many principles of law that are applicable to insurance cases, that involve insurance policies, that might be apropos in other cases, but I think that I have to the best of my ability given you what I think is helpful to you and necessary for you to have in this particular case.

When you retire to the jury room to deliberate you should select one of your number as a foreman or forelady, as the case may be, and he or she will preside over your deliberations in the jury room and will represent you in the further conduct of this case and will sign your verdict for you when you have reached a verdict. You should endeavor to conscientiously try to arrive at a verdict in the case. You should freely consult with one another in the jury room. Each side is entitled to the independent judgment of each one of you. Nevertheless in the jury room if you should be convinced that your view of the case is wrong, you should not be stubborn and still adhere to your view because you had that view. On the other hand, if after a free ex-

change of ideas you believe that the view you have is right, you should stick to it. It is your right to do that.

We have prepared for you two forms of verdict for your assistance. One form of verdict reads, "We, the jury, [628] find in favor of the plaintiff and assess the damages against the defendant in the sum of blank dollars." If you find in favor of the plaintiff, you will write in the amount of the award in the blank space and your foreman will sign it for you and that will be your verdict.

The other form of verdict reads, "We the jury find in favor of the defendant." If you decide the plaintiff is not entitled to recover, that is the form of verdict you will use, and that form of verdict will be signed by your foreman if you agree to it. Your verdict must be unanimous. In the Federal Court we do not have a system of a three-quarters verdict as in the State Courts. Therefore you should not return to the courtroom with a verdict from the jury room unless in the jury room all of you have agreed to the verdict.

After you have retired and have selected a foreman, if you wish to see any of the exhibits in the case you may send word through the bailiff and the Court will see to it that they are sent to you.

Does either side wish to note any corrections? It may be I shall want to correct or change or add something to what I have told you after consultation with the counsel in the case, so I will excuse the jury temporarily at this time. Please mind the case is not yet submitted to you. You are not yet to dis-

cuss the case among yourselves or to form or express an opinion concerning it. I will bring you back again in a [629] few minutes and let you know if I have anything further to say to you.

(Thereupon the jury was excused from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Hilger: Your Honor, in giving the instruction regarding the maximum verdict no mention was made of the possibility that the jury could award interest as well. I do not know how we should handle that.

The Court: I do not think that that is a matter for the jury to determine, whether interest should be allowed or not. If there is a verdict for the plaintiff in the case, for whatever amount it is, the Court would allow interest upon your application to be added to the judgment, but I do not think the awarding of interest is anything more than a legal matter.

Mr. Hilger: My experience in a contract action interest to the time of judgment has been left to the discretion of the jury as to whether or not they wish to add it.

The Court: I have never done that. I have never heard of it being done in the Federal Court. I think that could be cured by the fact that if the jury returns a verdict in favor of the plaintiff for a principal sum, if under the law the plaintiff is entitled to interest from the time of the breach, failure to pay, the Court would allow it and add it to [630] the judgment. I may be in error on that, but I have

never seen it left to the jury to determine whether interest should be allowed, because that has always been considered a matter of law.

Mr. Hilger: That is the point, I wanted to get that cleared up. Thank you.

The Court: Mr. Castro?

Mr. Castro: Yes, your Honor. There was a statement of fact which your Honor made that I believe is incorrect, namely, the plaintiff had paid for the insurance involved. The premium was unpaid. There has been no evidence in the case, your Honor, that the premium was paid.

The Court: The policy was in force and effect. You both assured me of that fact.

Mr. Castro: Yes, but there was no payment of premium for it. There has not been any premium to this date paid.

The Court: You mean the policy was just in force?

Mr. Castro: The premium had not been paid prior to the fire.

The Court: Do you think that is of some moment? Do you wish me to correct that? I would suggest there is no particular point in emphasizing it. However, if you wish me to correct it, I will. I assumed the fact that the policy was in full force and effect, presumptively the premium had been [631] paid.

Mr. Castro: The second point I have in mind is your Honor instructed on the failure to comply with the demand for books and invoices. However,

you stated that the burden of proof would be upon the defendant to show that failure to comply.

The Court: Failure to comply with the California Insurance Code willfully and purposefully. That is what I said to them. I have it written down.

Mr. Castro: Yes, your Honor.

The Court: I did not say the burden was on the defendant to show that the plaintiff had not produced books and records. I said that the burden was on the defendant to prove that the plaintiff had willfully failed to produce material and records.

Mr. Castro: Then I think the jury should be instructed on the subject that it is not a question of willfullness as to the production of books, records and invoices. Those are conditions of the policy which have to be met, if those records were available.

The Court: I think I will stand on the instruction I gave. I think that was a fair instruction.

Mr. Castro: With reference to the other instruction which I have in mind, we proposed an instruction defining stock within the meaning of the policy, which is what the insurance [632] policy covers, and not equipment. The Court did not give an instruction in defining what is meant by stock under the policy, and in particular I have reference to—

The Court: The welder?

Mr. Castro: The welder, yes, your Honor.

The Court: Do you want me to give an instruction particularly on the welder that, if it was used in the business, it was not covered by the policy, but if it was part of the stock in trade it would be?

Mr. Castro: Yes, your Honor.

The Court: Do you want me to give that?

Mr. Castro: Yes, I think it should be.

The Court: I will give that instruction. I did not get down to that minutia in instructions. That was all.

Mr. Castro: Then, your Honor, we proposed several instructions, one of which was instruction number five with reference to whether compliance with the conditions of the policy is mandatory. That is entitled "Meaning of the Word 'Shall'".

The Court: I do not consider that a necessary instruction.

Mr. Castro: The instruction number three relates to the subject I have already discussed with the Court concerning compliance with the conditions of the policy before recovery has been made. [633]

The next instruction, number four, relates to the same problem concerning burden of proof. Has he sustained burden of proof that he has met with the conditions of the policy?

The next instruction is number six was not covered.

The Court: Do I understand, so your record may be complete, you are excepting for failure to give those instructions?

Mr. Castro: That I am now noting.

The Court: Because, you see, I will file your proposed instructions so that your reference to them by number would be identifiable.

Mr. Castro: Fine. That would be instruction six, the failure of the insured, the plaintiff, to take care

of the property and the suggestion in the testimony that certain properties were taken by theft.

Instruction number eight, relating to concealment and fraud as defined by the policy.

Instruction number seventeen, what the effect of the plaintiff in having special knowledge concerning the subject matter of the inventory is.

Instruction number fifteen, relating to a misrepresentation.

Instruction number twenty, defining when disclosures by the plaintiff are required. [634]

Instruction number eighteen, defining what is meant by the term "Concealment."

Instruction number nineteen, dealing with the elements of intent and concealment.

Instruction number twenty-one, dealing with the elements of materiality and the concealment.

Instruction number twenty-four, relating to the use of circumstantial evidence in fraud, misrepresentation and the concealment. I believe that covers each of the matters that I have in mind, your Honor.

The Court: Very well. All the exceptions will be noted. Will you bring the jury back and I will instruct them about the welder.

(Thereupon the jury was returned to the courtroom and the following proceedings were had in their presence:)

The Court: How much was that welder?

Mr. Hilger: \$759.

The Court: Members of the jury, there is one matter, somewhat minor in its nature, although

nevertheless of importance, that I neglected to give you an instruction on. One of the items that is claimed by the plaintiff and placed on the black-board by the attorney for the plaintiff was a welder, \$759. There is some dispute between the parties as to whether or not this was a part of the stock in trade of the plaintiff or whether or not it was a piece of equipment that [635] was used on the premises. The value of the welder, if you go into the question of determining the value of the inventory, if you find from the evidence it was part of the stock in trade, you may take it into consideration as a part of the claim evaluated in this case. If on the other hand you find from the evidence in the case it was a part of the equipment used in the conduct of the business, then it is not covered by the terms of the policy and you should disregard it. That is a question of fact with respect to the welder which you would have to determine. Otherwise the instructions I have given you are complete, and you may now retire and consider your verdict.

(Thereupon, at 2:40 p.m., the jury retired from the courtroom to deliberate upon their verdict. At 6:00 p.m. the jury returned to the courtroom, and in the presence of the Court and counsel for the respective parties the following occurred:)

The Court: The Court is in receipt of the following indication from the jury:

“Testimony on all welders, further instructions on the term ‘fraud’ in relation to employer-employee.”

That last request is amplified by the following statement:

"Is employer responsible for possible [636] mis-statements or fraud of an employee on a statement or document if the employer signs the document?"

Gentlemen, do I understand that what you want is the testimony on all of the welders? Is that what you mean?

The Foreman: Yes, your Honor.

The Court: You need not stand up. I wish to advise you, with the consent of counsel, that there is only one welder that is involved in the case, because only the value of one welder is claimed as a loss. There were other welders, but the plaintiff has not claimed any loss on those welders because they were equipment. As I explained to you in my instructions, the one welder in question, the problem for you to decide is whether or not that was stock in trade or a piece of equipment used. If it was stock in trade, it would be properly includable in the claim of loss, but if it was a piece of equipment it would not. So I do not quite understand what the need is for the jury to hear testimony, if there is any, on any welders that are not involved in the claim. If you wish to hear any testimony with respect to the one welder in question, the reporter has found what he thinks is the testimony in that regard and will read it to you.

The Foreman: There seems to be confusion, your Honor, regarding welders. Some think there were three.

The Court: I know, but I just explained to you,

as [637] I did at the time of the instructions, that there is only one welder with which you are concerned. There is no use of your spending your time considering something that is not involved in this lawsuit.

The Foreman: May we have that testimony read?

The Court: All right.

(Thereupon the reporter read the following portions of the record: Page 59, line 3, to Page 60, line 15.)

The Court: All right. Is there any other testimony with respect to that welder that you have been able to locate, Mr. Sweeney?

The Reporter: No, your Honor.

The Court: Members of the jury, with respect to the inquiry which you have made, "Is employer responsible for possible misstatement or fraud of employee on a statement or document if the employer signs the document," I must say to you that I am unable to answer that question. That is an abstract question of law and it could not be answered by any Judge in my opinion without reference to the particular facts and circumstances. I do not know what the jury has in mind with respect to the matter, and I will go no further than to say that the Court is unable to give you any advice on an abstract principle of law, because there may be a dozen cases in which there might be responsibility and there might be another dozen cases in which there might not be responsibility. [638] Each case would stand or fall on its own, and I am not in a

position to give you an instruction on some abstract principal of law such as that. You will have to work out your conclusion on the basis of the instructions which I have heretofore given you.

It is now 6:15. If you have not been able to agree on a verdict as yet, and if you are hungry, I will arrange for the bailiff to take you to dinner now and you can resume your deliberations after dinner. What is your view on that? Would you prefer to go to dinner or would you prefer to resume your deliberations for a while? Mr. Foreman, you might quietly convass the jurors and see what they want in that regard.

(The jurors spoke among themselves in a voice inaudible to the reporter.)

The Foreman: Your Honor, we would like to continue deliberating for a while.

The Court: All right. You may resume your deliberations.

(Thereupon the jury retired to continue their deliberations, and at 6:40 p.m. the jury returned to the courtroom, and in the presence of the Court and counsel for the respective parties the following occurred:)

The Court: Members of the jury, have you reached a verdict?

The Foreman: Yes, we have, your Honor. [639]

The Court: Will you hand the verdict to the Deputy Marshal.

(The verdict was handed through the Deputy Marshal to the Court.)

The Court: Will you read the verdict to the jury, Mr. Clerk.

The Clerk: Yes, your Honor. Ladies and gentlemen of the jury, harken to your verdict as it will stand recorded:

“We the jury find in favor of the plaintiff and assess the damage as against the defendant in the sum of \$20,000.”

Is the verdict as read the unanimous verdict of all the jurors in the jury box?

(All jurors indicated that it was his or her verdict.)

The Court: Do you wish the jury polled?

Mr. Castro: Please, your Honor.

(Thereupon the jury was polled, and as the name of each juror was called, he or she answered that the verdict was his or her verdict.)

The Court: The twelve jurors having answered in the affirmative, the verdict as read is the verdict of the jury. The Clerk may enter the verdict. Before the jury is discharged today I would like to have read into the record a communication which I have received from the jury while it was deliberating. The question was, “Is interest applicable on [640] amount awarded to plaintiff?” That is signed by the foreman. To which the Court responded as follows: “Interest is an item within the Judge’s power to allow, since decision as to whether interest should be allowed is a matter of law.”

Members of the jury, the Court wishes to thank you for the attention that you have given this case and for the many days that you have spent here

and your prompt attendance at the times fixed for the various hearings. I do not know when you will be called upon for further jury duty, but when that time comes you will get the news from the United States Marshal. I won't keep you any longer. You are free to go now.

(Thereupon the jury was excused, and after they had left the following occurred:)

The Court: Mr. Castro, do you wish a stay of execution?

Mr. Castro: Yes, your Honor. I discussed it with Mr. Hilger and I think it is satisfactory with him.

The Court: Very well, and on your question of interest, you might make some motion in regard to interest. I do not know what the view of counsel on the other side would be. Maybe you would prefer to defer that.

Mr. Hilger: At this time, in view of the distance between my office and the place where the Court is sitting, if I might at this time apply to the Court and move for the [641] allowance of interest from October 22, 1956, on the basis that the cause of action accrued and the money became due on that date, and under the authorities cited in the pretrial memorandum heretofore filed in this action, the debt being due on that day, and having been ascertained to have been due, it is the feeling of the plaintiff that interest is in order and should be allowed.

The Court: Do you wish to oppose that?

Mr. Castro: I have no authorities to cite to the contrary at this time.

The Court: Very well. I will grant your motion

then. The clerk will have to calculate the interest. The Court will allow interest on the judgment from October 22nd—is there any dispute about the date?

Mr. Castro: 60 days after the receipt of proof of loss, which I think was August 24th.

Mr. Hilger: That is correct.

The Court: The Court will allow interest and the clerk will enter as a part of the judgment interest on the amount awarded by the jury at seven percent from October 22nd, 1956, to the date of judgment.

Mr. Hilger: Thank you, your Honor.

(Thereupon the Court adjourned.) [642]

[Endorsed]: Filed January 17, 1958.

[Endorsed]: No. 15820. United States Court of Appeals for the Ninth Circuit. Boston Insurance Company, a corporation, Appellant, vs. Hyrum Jensen, individually and doing business as Eureka Lumber Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: December 11, 1957.

Docketed: December 18, 1957.

Reporter's Transcript filed January 21, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15820

BOSTON INSURANCE COMPANY, a corpora-
tion, Appellant,

vs.

HYRUM JENSEN, individually and doing busi-
ness as Eureka Lumber Company, Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant intends to rely on the following points
in this appeal:

1. The evidence was sufficient to submit to the jury the issue whether Appellee and Harold Dee Jensen entered into a conspiracy to and did set fire to the insured property to defraud Appellant.

2. The evidence was sufficient to submit to the jury the issue whether Harold Dee Jensen wilfully set fire to the insured property.

3. Evidence offered by Appellant of the financial condition of Appellee and Harold Dee Jensen was admissible to establish motive on the part of Appellee and Harold Dee Jensen to form a conspiracy to and set fire to the insured property to defraud Appellant; and to establish that Appellee did not have the financial ability to acquire the inventory set forth in his Proof of Loss.

4. The Court erred in allowing the witness A. J. Franceschi to testify as to the credit rating of Appellee and the ability of Appellee to repay loans.

5. Evidence offered by Appellant as to (a) the transfer of trucks by Appellee to H. D. Jensen following the fire; and (b) the written agreement between Appellee, Harold Dee Jensen and others set forth in Ex. J for identification was admissible to establish the conspiracy and to impeach Appellee.

6. Evidence offered by Appellant to show that Appellee breached the conditions of the insurance policy, entitling Appellant to examine H. D. Jensen under oath, by knowingly causing Harold Dee Jensen not to appear for such an examination under oath as scheduled by Appellant was admissible.

7. The Court erred in instructing the jury that the burden of proof was upon Appellant to establish that Appellee "wilfully" did not comply with the request of Appellant to produce books of account, bills, invoices and other vouchers relating to the items listed in the Proof of Loss.

8. The motion of Appellant for a directed verdict against Appellee should have been granted in that the evidence showed as a matter of law, that Appellee did not perform the conditions of his insurance policy, relating to the production of books of account, bills, invoices and other vouchers covering the "out of sight" items in the Proof of Loss; and as to the examination under oath of Harold Dee Jensen.

9. The Court erred in refusing to allow Witness

Mrs. Ella Van Harper to testify to a conversation with Harold Dee Jensen concerning the accounts receivable book after the fire.

10. The Court erred in refusing to strike from the record a voluntary statement by Appellee that a statement by counsel for Appellant in an offer of a proof was a lie.

11. The Court erred in refusing to allow Appellant to cross examine Appellee as to the following matters:

- (a) Cost of fence boards;
- (b) Metal Items listed as a total loss in the Proof of Loss;
- (c) Diesel engine which was a part of a sawmill;
- (d) The amount of credit received for the sawmill from Dayton Murray Truck Sales;
- (e) The outside doors in the damaged building; and
- (f) The time the fire originated.

12. The Court erred in allowing Appellee to testify as to conversations outside of the presence of Appellant relating to:

- (a) Unidentified persons seen at the scene of the fire;
- (b) A potential order for redwood molding from Russ Sharp.

13. A motion by Appellant to reopen the evidence to show that two (2) electric motors listed in the Proof of Loss were owned by Hill & Morton,

Inc., a corporation, (and not Appellee) should have been granted.

14. The motion of Appellant for Judgment Notwithstanding the Verdict should have been granted.

15. Jury Instructions numbers 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 36, 37 and 38 proposed by Appellant should have been given.

16. The testimony of Dayton Murray, Jr. relating to the sawmill listed in the Proof of Loss was inadmissible on the ground of hearsay.

Dated: January 10th, 1958.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant and
Third Party Plaintiff.

Certificate of Service by Mail attached.

[Endorsed]: Filed January 10, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
DEEMED BY APPELLANT TO BE NECESSARY
FOR THE CONSIDERATION
OF THE APPEAL

Pursuant to Rule 17 (6) appellant designated the following parts of the record deemed necessary for the consideration of the appeal:

1. Complaint.

2. Answer.
3. Third Party Complaint.
4. Answer of Third Party Defendant, Hyrum Jensen to the Third Party Complaint.
5. Answer of Third Party defendant Harold D. Jensen to Third Party Complaint.
6. Defendant's proposed instructions #3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 36, 37 and 38.
7. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.
8. Verdict.
9. Judgment entered on verdict.
10. Motion of defendant for Judgment Notwithstanding the Verdict or, in the alternative, Motion for a New Trial.
11. Order denying Motion of Appellant for Judgment Notwithstanding the verdict or, in the alternative, Motion for a New Trial.
12. Plaintiffs' Exhibits 1 to 21 inclusive.
13. Defendants' Exhibits A to Z inclusive, and AA to AY inclusive.
14. Reporter's transcript should include the following objections noted in the depositions of Dayton Murray, Jr. and A. J. Franceschi.

(a) Deposition of Dayton Murray, Jr. page 8 line 10 to page 9 line 10:

* * * * *

Deposition of Dayton Murray, Jr. page 18, line 13 to page 19 line 20:

* * * * *

Deposition of A. J. Franceschi page 3, lines 1 to 3:

* * * * *

15. Notice of Appeal.

16. Designation of portions of the record, proceedings and evidence to be contained on the record on appeal.

17. Designation of parts of record deemed by appellant to be necessary for consideration in the appeal.

18. Statement of the points on which appellant intends to rely.

19. All other records required by the provisions of Rule 75 (g) of the Federal Rules of Civil Procedure.

Dated: January 10th, 1958.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant and
Third Party Plaintiff.

Certificate of Service by Mail attached.

[Endorsed]: Filed January 10, 1958.

No. 15,820

United States Court of Appeals
For the Ninth Circuit

BOSTON INSURANCE COMPANY,
a corporation,

Appellant,

vs.

HYRUM JENSEN, individually and doing
business as Eureka Lumber Com-
pany,

Appellee.

REPLY BRIEF OF APPELLANT.

AUGUSTUS CASTRO,
333 Montgomery Street,
San Francisco 4, California,
Attorney for Appellant.

FILED

JUL 14 1958

PAUL P. O'BRIEN, CLERK

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**United States Court of Appeals
For the Ninth Circuit**

BOSTON INSURANCE COMPANY,
a corporation,

Appellant,

vs.

HYRUM JENSEN, individually and doing
business as Eureka Lumber Com-
pany,

Appellee.

REPLY BRIEF OF APPELLANT.

ISSUES.

In its answer to the complaint and the Third Party Complaint, Appellant alleged under its terms the policy was void because: (a) Appellee submitted to fraudulent proof of loss as to the amount of stock and loss and his knowledge of the origin of the fire (17);¹ (b) Appellee did not comply with the policy conditions requiring Appellee to produce for examination all books of accounts, invoices and other vouchers or certified copies thereof if originals be lost (14-15), and to submit H. D. Jensen to an examination under oath (16), either of which is a condition precedent to recovery under the policy; (c) H. D. Jensen was a real party in interest (19) who supplied false information as to the amount of stock and loss, and

¹Reference to the Transcript of Record.

who set the fire; (d) Appellee conspired with H. D. Jensen in submitting such false Proof of Loss, in setting the fire, and in refusing to submit said books, invoices and vouchers or copies thereof, and said H. D. Jensen did not submit for such requested examination under oath (17-19)—any of such acts alone would void the policy.

ARGUMENT.

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING BY THE JURY OF AN INCENDIARY FIRE AND THAT APPELLEE AND H. D. JENSEN ENTERED INTO A CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND BY FALSIFYING THE QUANTITY, VALUE AND DAMAGE OF THE STOCK IN THE PROOF OF LOSS (Specifications of Error I and II).

A. APPLICABLE LAW WAS ADMITTED BY APPELLEE.

The authorities for rules hereinafter mentioned were cited at pages 54, 57, 75, 76 of Appellant's Opening Brief, and are not recited here, because in his Brief, Appellee neither cited cases to the contrary nor disputed such rules.

On this appeal, as to Specifications of Error I and II, all the evidence must be viewed in the light most favorable to Appellant, all conflicts must be resolved in favor of Appellant, every inference that can reasonably be drawn from the evidence produced to show the defenses of fraud, concealment, conspiracy to defraud by submitting a false Proof of Loss or causing an incendiary fire must be drawn in favor of Appellant.

Fraud committed by an insured either by filing a false Proof of Loss as to the amount of stock and the loss or by setting a fire totally voids the policy.

A conspiracy may be formed and executed to defraud in either manner.

The burden of proving such conspiracy to defraud admittedly rests upon Appellant. In a civil case such a conspiracy is proved by a preponderance of evidence. Both the fraudulent claim and the incendiary fire are provable by circumstantial evidence.

Evidence of financial condition is admissible to establish a motive and to connect a person with a conspiracy to defraud.

B. THE CIRCUMSTANTIAL EVIDENCE DOES NOT HAVE TO EXCLUDE EACH AND EVERY OTHER REASONABLE INFERENCE POSSIBLY DERIVABLE FROM THE FACTS PROVED.

In *Hilyar v. Union Ice Co.* (1945), 45 C.2d 30, 38, 286 P.2d 21, the Court stated:

“It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom . . . (*Katenkamp v. Union Realty Co.*, 36 C.A.2d 602, 617 (98 P.2d 239).) The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved.”

Chalmers v. Hawkins (1926), 78 C.A. 733, 738, 248 P. 727.

To support the contrary proposition Appellee cited *People v. Lepkojes* (1920), 48 C.A. 654, 192 P. 160 and *People v. Angelopoulos* (1939), 30 C.A.2d 538, 86 P. 2d 873 (Appellee’s Brief, p. 8). Since both decisions are in criminal actions they are inapplicable to this civil action where arson as an act of fraud

is not required to be established beyond a reasonable doubt.

Bell v. Graham (1951), 105 C.A.2d 765, 767, 234 P.2d 158;

Edmonds v. Wilcox (1918), 178 C. 222, 172 Pac. 1101.

Further, *People v. Holman* (1945), 72 C.A.2d 75, 91, 164 P.2d 297, shows that even in a criminal case Appellee's statement is erroneous because it is for the jury to determine whether any act of a person is incriminatory.

C. APPELLEE DID NOT DENY THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING BY THE JURY THAT HE CONSPIRED WITH H. D. JENSEN TO DEFRAUD APPELLANT BY FALSIFYING THE QUANTITY, VALUE AND DAMAGE OF THE STOCK IN THE PROOF OF LOSS.

1. Appellee has failed to respond to Specification of Error I in respect to Appellant's contention that there was reversible error in the trial court's refusal to submit to the jury the issue of conspiracy to defraud by filing false proof of loss as to the amount of stock and damage (See: Appellant's Opening Brief, p. 11). In Appellee's Brief, page 5, the following statement appears:

"There is no sufficient substantial evidence to support a finding of arson. Therefore the Court properly withdrew the issue from the jury and properly excluded evidence of motive, conspiracy, fraudulent concealment of arson and false claim *based on arson* until after the basic ingredient, arson, was proved. It is the contention of the appellee that a finding that arson was properly withdrawn from the jury and not proved would dispose of specifications of error, numbers 1, 2,

4, 8 and 11, since all those specifications depend upon a prior proof of arson before they become material''. (Emphasis added.)

2. It is undisputed that there was sufficient evidence to submit to the jury that the *Appellee* defrauded the Appellant by filing a false Proof of Loss as to the amount of stock and damage. This issue was submitted to the jury. Therefore, the only element required to submit a question of a conspiracy between Appellee and H. D. Jensen to defraud Appellant, by filing a false Proof of Loss as to the amount of stock and damage, is evidence reflecting the relations of the parties, the interest of the parties and the circumstances preceding and attending the culmination of the conspiracy. On pages 70-75 of Appellant's Opening Brief the sufficiency of this evidence is pointed out. By electing to base his entire argument in respect to Specification I on the assertion that the overt act of arson was not proved, the Appellee fails to deny and admits for the purpose of this appeal this separate and independent ground for reversal. The requested instruction by the jury as to whether an employer is responsible for the fraud of an employee (599) clearly demonstrates the prejudicial effect of the ruling.

D. APPELLEE HAS ADMITTED THE EXISTENCE OF EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT APPELLEE AND H. D. JENSEN CONSPIRED TO AND DID SET THE FIRE.

1. Incendiary Origin of Fire.

(a) Point of origin of fire.

At pages 1 and 2 of his Brief, Appellee admitted the point of origin of the fire was at the ground floor

level in the SW room in the east $\frac{1}{2}$ of the building, where the wooden floor showed deep-seated charring. Ordinarily, this area was used to store merchandise consisting of plastic shingles and plywood (101).

(b) Inflammable liquids at point of origin.

The deep-seated charring on the floor including the edges and underside of the floor lumber showed that an inflammable fuel had been added to the floor prior to the ignition of the fire (445-446). At page 2 of his Brief, Appellee admitted that at the point of origin the fireman found an empty open topped 5 gal. container with diesel fluid odors and a 50 gal. drum partially filled with gasoline with its pump loosely affixed (440).

(i) Inflammables not usually kept at point of origin.

In phrasing this admission, Appellee made statements of fact from which a reader of his Brief would infer that mechanical work was done at the point of origin to cause the presence of grease, diesel fuel, gasoline and oil on the floor. The record below is to the contrary: Mechanical work was *not done in the SW room*, but was done on the dirt floor of the open West $\frac{1}{2}$ of the building at the work bench (254) at the south wall (440, M^s on Ex. A.). The Southwest section of the West $\frac{1}{2}$ of the building, had been cleared for a truck (86), and was leased to James Ragsdale to construct a sawmill (355) which was removed from the building on Saturday before the fire (370). While it had been tested, the portable sawmill in the southeast section had not been operated as a

sawmill (150), and, according to Appellee, was covered with redwood molding (141-145; 150-159). On the morning of the fire, when she was in the SW room and called H. D. Jensen from the "Kaiser" room, Bookkeeper Mrs. Ellen Van Harpen did not see any 50 gal. drum in the SW room (495). There was no evidence that any 50 gal. drum was placed in the SW room prior to the time Mrs. Van Harpen was in the SW room. In listing the contents of the rooms in the East $\frac{1}{2}$ of the building, Appellee did not state any diesel fluid, grease, oil or gasoline were stored in the SW room (100-102). At page 12 of his Brief, Appellee stated:

"Even the expert called by the Appellant saw nothing unusual in the presence of inflammables at the scene of the origin of the fire (442)."

This is a complete misstatement of the evidence transcribed at page 442. Witness Harold McBeth was not referring to the inflammable fuel on the wooden floor of the SW room. He did not testify that it was usual to have inflammable liquids on the wooden floor at the point of origin. Instead, he was pointing out that in the separated dirt floor section of the open shed portion of the building, where they had worked on the sawmill and done greasing, there was greasing material (442).

Such work area was in the West $\frac{1}{2}$ of the building, completely separated from the SW room by the partition wall dividing the building in half (80, 411). No witness testified that the SW room, the point of origin, was a place where such containers were usually or ever kept.

(ii) In *People v. Gilyard* (1933) 134 C.A. 184, 189, 25 P.2d 35 and *People v. Kasparoff* (1928) 94 C.A. 7, 9-10, 270 P. 398, the Court specifically pointed out that the presence of an inflammable liquid was real evidence tending to prove the fire was of incendiary origin—rebutting any presumption of an accidental fire (Appellee's Contention pages 7-8). Even if such presumption exists it can have no bearing in a case taken away from the jury. See: *Bell v. Graham* (1951) 105 C.A.2d 765, 767.

(c) No natural causes of fire at the point of origin.

Appellee did not deny the fact that the evidence showed there were no natural sources of fire such as heating devices (445), or any electric wiring at said point of origin. In *People v. Sherman* (1950) 97 C.A. 2d 245, 217 P.2d 715, the Court specifically noted that the fact there were no natural causes at the point of origin of the fire was evidence that the fire was of an incendiary nature. At page 16 of his Brief, Appellee erroneously states that in *People v. Seltzer*, 107 C.A. 2d 627, 237 P.2d 689, the court considered "the fire was obviously of incendiary origin". To the contrary, there the evidence showed a defective light switch at the point of origin.

(i) Not necessary to show method by which fire caused.

At page 13 of his Brief, Appellee contends that Appellant has not proved any theory of the cause of the fire. To the contrary, a reading of the transcript of the records at pages 443-448 shows Witness McBeth was of the opinion that the fire was of an incendiary origin. While Witness Harold McBeth gave no opinion

as to the method used to ignite the fire or identity of the source of ignition of the fire, he pointed out, that there was a criminal agency at the point of origin; namely, an inflammable fuel had been added to the underside of the floor. He removed pieces of the flooring, and found deep seated burning on the underside of the floor boards (instead of the top of the boards). In his opinion inflammable fuel had been poured under the floor. As stated in Appellant's Opening Brief the method of igniting the fire does not have to be proved. *People v. Hays* (1950) 101 C.A.2d 305, 311, 225 P.2d 600; *People v. Maas* (1956) 145 C.A.2d 69, 75, 301 P.2d 894. The proof is sufficient when a criminal agent is found at the point of origin.

(d) Inflammable fuels placed in stacked molding.

Two open topped 1 gal. containers and a partially burned rag, all with diesel odors, were in the alleged top grade redwood molding (M⁵ on Ex. A; 418-420, 437-439, Photo Ex. Z, "AA", "AJ"), where Fireman Alfred Breen found a "stubborn" fire and smelled petroleum odors (384, 386-7). No witness testified that the molding was the place where such containers were usually kept. A jury could well determine that the cans were placed in the molding to contribute to the rapid combustion and spread of the fire.

(e) H. D. Jensen fled from the building shortly before the fire was discovered.

From the Appellant's evidence the jury can reasonably find that H. D. Jensen fled from the building either immediately before or after the explosion occurred, and after the fire had started. The fact that

anyone is seen leaving a building in flight or otherwise, immediately before a fire is discovered is evidence that the fire was not naturally caused. See: *People v. Sherman* (1950) 97 C.A.2d 245, 217 P.2d 715; *People v. Holman* (1945) 72 C.A.2d 75, 164 P.2d 297.

(f) Admission of Appellee that the fire was of an incendiary origin.

The evidentiary effect of the admitted statement by the Appellee that "somebody set it afire. We had better get an investigator" is self-evident (114).

2. H. D. Jensen Set the Fire.

(a) H. D. Jensen had opportunity to set fire.

It is uncontradicted that on the morning of the fire, all the employees who reported for work, except Bookkeeper Ellen Van Harpen, were told there was no work, and the only persons in the building the morning of the fire were Van Harpen, Appellee and H. D. Jensen (370, 494, 528). During the morning H. D. Jensen was alone at the point of origin twice. When Bookkeeper Van Harpen called him from the Kaiser room, the 50 gal. gasoline drum was not in the SW room (495); H. D. Jensen admitted handling the pump to draw gasoline for his 8 year old son's car and he left the can in the back of the car (526-528). When Bookkeeper Van Harpen left for lunch at 12:05 P.M., H. D. Jensen was alone in the building until shortly before the explosion was heard (529, 532, 261). It is uncontradicted that H. D. Jensen was in possession of diesel fuel and gasoline to pour on the floor at the point of origin (445-446).

Contrary to Appellee's assertion, there is nothing unfavorable to Appellant in the testimony of Neal A. Jensen. He did not fix the time he saw H. D. Jensen walking west on Third Avenue to Broadway. After the talk, Neal Jensen continued to load the truck. He did not see H. D. Jensen again. After Neal Jensen loaded his truck he went to the Hess Company office at the SE corner of Third Avenue and Commercial Streets, where he gave the lumber talley to Mrs. Kellam. Then he heard an explosion in the insured building and saw the smoke of the fire (396-398). Neal Jensen did not see H. D. Jensen enter or drive his pick-up away. H. D. Jensen had the opportunity to re-enter the building without being seen, and there is nothing contrary in Neal A. Jensen's testimony.

(b) H. D. Jensen fled from fire.

At page 14 of his Brief, Appellee states H. D. Jensen "drove south along Broadway to the intersection of Broadway and Third". The record is to the contrary. After he heard the explosion, Percy L. Musser, from his office at the SE corner of Third and Broadway, saw H. D. Jensen driving a GMC pickup West on Third Street from the subject building, which was approximately 300 feet from his office (260-261). At page 14, Appellee states that Musser was unable to describe the speed of H. D. Jensen's vehicle. The record shows that "very shortly" after he heard the explosion, Musser saw H. D. Jensen driving west on Third Street, and he was *going very fast* (261), and he came to a sudden stop right in front of the door". Further:

“A. He opened the door like he was going to get out about a foot, I would say. And I was on the telephone, and he closed the door. And he must have *shoved the foot throttle down to the floorboard and took off.*

Q. Would you describe the rate of speed as he continued on?

A. The rate of speed wasn't very great but the *tires was sure going around.*” (262) (Emphasis supplied.)

Then Musser saw the fire at the building (262-3), and phoned in the fire alarm (264), which was recorded at 12:21 P.M. (408). Both Neal Jensen and Percy L. Musser heard the explosion. Yet, H. D. Jensen, who was closer to the explosion than either of the witnesses, disregarded the explosion and fire. Therefore, a jury could reasonably infer that he fled from the scene of the fire. *People v. Sherman*, supra; *People v. Holman*, supra.

(c) Locked building showed no person forced entry into building to set fire.

H. D. Jensen, son of the Appellee, locked the doors of the building immediately prior to the fire and the doors were still locked at the time the fire was discovered. This was evidence that H. D. Jensen set the building on fire. *People v. Sherman*, supra; *People v. Becker* (1949) 94 C.A.2d 434, 210 P.2d 871; *People v. Kessler* (1944) 62 C.A.2d 817, 145 P.2d 656.

(d) Appellee and H. D. Jensen had financial motive to set fire.

There was evidence of their poor financial condition in the record, although material evidence in this re-

gard was ruled inadmissible (see Appellant's Opening Brief, page 76).

(e) Inconsistent statements made by H. D. Jensen.

H. D. Jensen and Appellee made inconsistent statements concerning their presence at the building on the date of the fire (see Appellant's Opening Brief, page 69). Nowhere in his Brief has Appellee answered the evidence which showed that Appellee and H. D. Jensen made inconsistent statements as to the time each left the subject building. A jury may infer a consciousness of guilt from such inconsistent statements, *People v. Hays*, supra.

3. Appellee and H. D. Jensen Conspired in Setting the Fire.

Appellant's Opening Brief sets forth at pages 70 to 75 the evidence and law establishing the conspiracy. The sufficiency of the evidence as to the conspiracy between Appellee and H. D. Jensen in connection with Specification of Error No. 1 is admitted by Appellee by his failure to respond to this assertion in Appellant's Opening Brief and by his position that Specification of Error No. 1 depends entirely on the sufficiency of evidence on the overt act of arson.

4. The Statement of the Case and Argument in Appellee's Brief Contains Erroneous, Conflicting, Misleading and Self-serving Assertions in Respect to the Sufficiency of Evidence to Support a Finding that H. D. Jensen and Appellee Conspired to Defraud Appellant by Setting the Fire.

(a) Appellee has made statements of fact for which there is no evidence in the record to support, i.e., that inflammables were normally kept in the room where the fire originated (See: pp. 6, 7, above); that H. D. Jensen observed that Musser was busy on

the telephone (the evidence is that Musser was on the telephone, not that Jensen saw him); and that Jensen walked to his parked vehicle and drove away immediately after talking with customer (See: p. 11, above).

(b) Appellee has made statements that draw the inference most favorable to the Appellee. Conceding that these inferences could properly be drawn by the jury, they should be disregarded. On this appeal the court is concerned only with the inferences that could reasonably be drawn in favor of the Appellant. Therefore, the argumentative matter in Appellant's treatment of the evidence in this case is irrelevant.

(c) Appellee has made statements of fact on which there is conflicting evidence. Appellee states that the building was under insured. There is evidence in the record that included in the recent purchase price of \$42,500 for the real property on which the building was located, was one block of land in the City of Eureka, California. The building occupied only 9200 square feet of the block, 4600 square feet of which was a shed with a dirt floor open to the roof and at both ends. Photographs in evidence show the antiquity of the building and its general poor condition. Considering this evidence, the portion of the purchase price reasonably allocable to the building could not possibly exceed the \$10,000 insurance on the building. The Appellee states that there was uninsured personal property destroyed in the fire amounting to several thousands of dollars. Appellant was unable to offer any conflicting evidence on this issue as the trial court refused to allow Appellant to show

evidence as to the value of such property on the objection of Appellee that no claim was being made for any uninsured property. The court stated:

“I will sustain the objection. I do not see any point in wasting time on something that is not involved (442 Ex. AB Iden.)”

The law is settled that on an appeal from a case taken away from the jury the Appellate Court should disregard any conflicting evidence, *Estate of Arnold* (1905), 147 Cal. 583, 82 Pac. 252.

5. The Evidence Offered by Appellant is Admitted to be Probative of the Fact that H. D. Jensen Set the Fire.

Appellant's Opening Brief set forth authorities which established that evidence in the record is probative that the fire was set and that it was set by H. D. Jensen and Appellee. Appellee has not denied that these cases uphold the propositions for which they were cited but has sought only to point out certain scattered segments of evidence present in those cases that allegedly are not in the record herein. Even such comparison is unsound because of the difference in the degree of proof required in a civil case.

II. THE COURT ERRED IN EXCLUDING EVIDENCE OF THE FINANCIAL CONDITION OF APPELLEE AND H. D. JENSEN.

A. AS MOTIVE FOR FRAUD IN FILING A FALSE PROOF OF LOSS AS TO AMOUNT OF STOCK AND THE DAMAGE (Appellant's Opening Brief, 17, 18).

1. The trial court decided that there was sufficient evidence to allow the jury to pass on the issue of

whether Appellee defrauded Appellant by filing a false Proof of Loss in the amount of stock and the loss. Therefore, evidence of the poor financial condition of the Appellee is admissible to strengthen and corroborate the admittedly sufficient evidence of fraud. It is undeniable that motive is admissible to prove fraud and that financial condition is admissible to prove motive. See: *Anglo California Bank v. Lazard* (1939 Cir. 9), 106 Fed.2d 693, 703; *Ross v. Wellman* (1899), 102 Cal. 1, 36 Pac. 402; *Mallett Co. v. Helbing* (1901), 134 Cal. 676, 679, 66 Pac. 967. Moreover, this obvious error in refusing to allow the introduction of this evidence is not disputed by Appellee. Appellee's statement that Specification of Error II depends on the prior proof of arson is completely erroneous. It overlooks a principal issue of this appeal. The trial court's refusal to allow evidence of poor financial condition of Appellee to establish Appellee's fraud in filing a false Proof of Loss as to the amount of stock and damage is an independent ground for reversal.

B. MOTIVE FOR FRAUD IN SETTING THE FIRE.

1. Motive is Admissible to Prove Arson.

(a) Appellee has not disputed the Appellant's citations for the proposition that motive is admissible to prove arson. Our research has not revealed a single California case in which motive was not admissible to prove that an insured was responsible for setting fire to insured property. In an analogous defense of suicide on an accident insurance policy the law is apparently well settled that motive, is not only admis-

sible to prove the insured committed suicide, but is the most important evidence in the case. See: *Kettlewell v. Prudential Ins. Co.* (1954), 4 Ill. 2d 383, 122 NE 2d 817; *Webster v. N.Y. Life Ins.* (1926), 160 La. 854, 107 So. 599; *Green v. N.Y. Life Ins.* (1921), 182 NW 808, 192 Iowa 32. Apparently, Appellee also considers financial condition of the Appellee material to the question of arson because in his Brief he emphasizes the alleged good financial condition and the alleged under insurance of the Appellee in arguing that there was insufficient evidence of arson to go to the jury. The only possible relevance of this argument is to show lack of motive to set the fire.

(b) If a foundation that the fire was of an incendiary nature need be shown before evidence of motive to set the fire is introduced, then there is more than sufficient evidence in this record to do so (see Section I.D.1. above). The Appellate Court must draw every logical inference from defendant's evidence in the record in ruling on the admission of evidence of financial condition. The Appellate Court cannot rely on the Trial Court's opinion as to the weight of the evidence when laying a foundation. The trial court was not trying the fact in this instance but ruling on a matter of law, it was for the jury to determine the fact.

(c) It was error to exclude evidence of motive on the theory that the corpus delicti of the crime of arson was not established.

(i) The trial court refused to allow evidence of motive of Appellee to set the fire on the ground

that the corpus delicti of the crime of arson had not been established. Appellee on page 17 states:

“It is so well established that evidence of motive is not admissible until the corpus delicti has been established, that it does not require the citation of authorities.”

The ruling and the statement are unsound. The doctrine of corpus delicti, developed to prevent an accused of being convicted of a crime solely on his own confession or admission, has no bearing in a civil case. Moreover, our research has not revealed any California decision, criminal or civil, holding that evidence of motive may not be introduced before a corpus delicti has been proved.

(ii) Even assuming that a corpus delicti has to be established before evidence of motive to defraud is introduced in a civil action, a corpus delicti was sufficiently established in this case. California decisions are uniform in criminal cases that, although the corpus delicti must be proved beyond a reasonable doubt, only slight or prima facie evidence need be shown to establish the corpus delicti sufficiently to introduce evidence connecting defendant with the crime. In *People v. Jones* (1898), 123 C. 65, 55 Pac. 698, the Court said that even “weak and unsatisfactory evidence” was sufficient to establish the corpus delicti. In *People v. Ives* (1941), 17 C.2d 459, 463, 110 P.2d 408, the Supreme Court stated:

“The corpus delicti may be proven by circumstantial evidence and the reasonable inferences drawn therefrom. To warrant a conviction it must

be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced or corroborates it or strengthens reasonable inference drawn therefrom. If a *prima facie* case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient."

In a criminal action, evidence connecting the defendant with the crime strengthens and corroborates the *corpus delicti* and supplies the additional evidence necessary to prove the *corpus delicti* beyond a reasonable doubt. See: *People v. Moher* (1938), 24 C.A.2d 580, 582. The effect of the court's ruling was to prevent the Appellant from presenting evidence which would strengthen and corroborate other evidence showing incendiary nature of the fire. It is clear that less proof is required to *introduce evidence* of motive of a person who set a fire than is required to allow the jury to decide whether this person actually set the fire. In an arson case only slight or *prima facie* evidence of the incendiary nature of a fire is required to allow the introduction of other evidence connecting defendant with the fire. Thus, in a civil case, no more than slight or *prima facie* evidence could be required as a foundation for the introduction of evidence of motive. Logically, no one can deny that there is at least *prima facie* evidence showing the fire was of an incendiary origin. Therefore, the trial court's ruling in disallowing such evidence is separate and independent ground for reversing this judgment.

III. IT WAS ERROR TO LIMIT APPELLANT'S CROSS-EXAMINATION OF APPELLEE AS TO WHETHER APPELLEE KNOWINGLY CAUSED H. D. JENSEN NOT TO SUBMIT TO REQUESTED EXAMINATION UNDER OATH ON OCTOBER 12, 1956 (Specifications of Error VI and XIII).

In his Brief Appellee has not denied that the named insured under the policy was Eureka Lumber Company; the policy provided for Examination Under Oath to protect against fraud; California law requires full compliance with the Examination Under Oath provisions; the Examination Under Oath was properly scheduled; Appellee's counsel and H. D. Jensen received actual notice of the scheduled examination and Appellee had at least imputed knowledge of such scheduled examination, H. D. Jensen failed to appear for the examination and the defense was properly raised in Appellant's answer (Appellant's Opening Brief pages 96 to 102). Appellee does not distinguish, or cite any case contrary to, *Hart v. Mechanics & Trader's Ins. Co.* (1942), 146 F. Supp. 166, 169, which held under the same policy provision that the insurer was entitled to examine an employee of the insured. Also see: *Rosenfeld v. Union Ins. Society* (1957 D.C. N.Y.), 157 Fed. Supp. 395. Appellee's statement at page 5 that "Specification of Error IV" falls if there is no evidence of arson, overlooks that H. D. Jensen's failure to appear for scheduled examination under oath was an overt act in the conspiracy to defraud by submitting false proof of loss as to stock and loss, and as to the failure to produce records supporting the stock and loss. Therefore, Appellant should have been allowed to cross examine Appellee as to whether he caused H. D. Jensen not to appear

for the properly scheduled examination; and Appellant's Motion for a directed verdict upon the ground that the uncontradicted evidence showed Appellee had not complied with this condition precedent of the policy should have been granted.

A. ERROR TO REFUSE TO STRIKE OR PERMIT CROSS-EXAMINATION OF APPELLEE ON A VOLUNTARY STATEMENT "THAT IS A LIE".

Appellee's Brief does not deny the sequence of the events surrounding the statement "That is a lie" (211-221), and his brief offers no justification for the ruling excluding the right to cross-examination or to strike the statement. Such rulings were clearly prejudicial to Appellant.

IV. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN APPELLANT'S INSTRUCTIONS RE: CONCEALMENT NOS. 8, 18, 19 AND 21 (Specification of Error X).

Nowhere did Appellee state that the form of any requested instructions was in error. Instead, he contends that there was no error in refusing such instructions because there was no evidence to show any concealment. To the contrary, the jury could have found from the evidence that Appellee was withholding information when he stated in the Proof of Loss that he did not know the cause of the fire, that there had been no change in the exposure of the property and he did not know that Appellant had requested H. D. Jensen to submit to an examination under oath (208-217).

A. APPELLANT DID NOT AGREE THAT THERE WAS NO BASIS UPON WHICH THE COURT COULD INSTRUCT RE: FRAUD OF AN EMPLOYEE BEING IMPUTED TO THE EMPLOYER (Specification of Error XI-A).

At page 6 and 7 of his Brief, Appellee states that at a consultation in the court's chambers in response to the inquiry of the jury "It was agreed that there would be no basis upon which the court could instruct on the issue of fraud of an employee being imputable to the employer and that at the conclusion of the conference the Court indicated its intention not to instruct."

Unfortunately, proceedings in chambers were not reported. Appellant made no such agreement. To the contrary throughout the trial and this appeal Appellant has contended that Appellee was responsible for the acts of H. D. Jensen relating to a fraudulent proof of loss and setting the fire. Appellant does not agree that there was no basis upon which the court could instruct that Appellee was responsible for the fraud of H. D. Jensen. A reading of the transcript where the court discussed the inquiry of the jury as to the responsibility of an employer for the fraud of an employee, shows the court did not allow an opportunity to Appellant to except to the failure to instruct on such issue (598-601). Appellee's brief does not discuss *Stockton Combined Harvester & Agr. Workers v. Glens Falls Insurance Co.* (1893), 98 Cal. 557, 33 P. 633, or *Hyland v. Miller Nat'l Ins. Co.* (1932 Cir. 9), 91 F.2d 735, where the fraud of the agent bound the insured employer.

V. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED ON APPELLANT'S PROPOSED INSTRUCTION RE: MISREPRESENTATION OR FRAUD CONCERNING THE ORIGIN OF THE FIRE NO. 24 (Specification of Error XI).

Nowhere in his Brief does Appellee state that the form of the requested instruction is in error, but he contends the jury was properly instructed on the subject of fraud.

While the Court instructed the jury that the burden was on Appellant to prove that Appellee wilfully executed a fraudulent Proof of Loss, the Court did not define the extent of the burden of proof (preponderance of the evidence, or otherwise), whether circumstantial evidence could satisfy the burden of proof or whether concealment, misrepresentation or fraud as to the origin of the fire would void the policy. Appellee has not distinguished the authorities supporting the instruction or cited any contrary authorities. Therefore, it was error to fail to submit such issues to the jury.

VI. TESTIMONY OF DAYTON MURRAY, JR. THAT EUREKA LUMBER COMPANY WAS ALLOWED A "TRADE-IN" CREDIT OF \$7,500.00 ON A SAWMILL FOR THE PURCHASE OF A TRUCK AND TRAILER WAS HEARSAY AND INADMISSIBLE (Specification of Error VI).

Appellee contends the testimony did not constitute hearsay because Dayton Murray Jr. received it from the buyer and seller of the truck and sawmill. It is contradicted that at the time of the alleged transaction

on January 1, 1956, Dayton Murray, Jr. was neither an employee nor an officer of seller Dayton Murray Truck Sales and had not been since September, 1953 (346-358). Witness Murray, Jr. had no direct or personal knowledge of the transaction, but his knowledge was based on discussions with H. D. Jensen, and the then owner of Dayton Murray Truck Sales, W. A. Threlkeld (336). Neither Appellant nor any representative of Appellant was present at any conversation between them. Clearly, such conversations are not business records within the Uniform Business Records as Evidence Act, which refers to recorded data. Further, the error was compounded by permitting Witness Murray, Jr. to testify as to the meaning of the terms on the carbon invoice because such testimony called for an opinion, not a fact, and it was likewise based on hearsay. To the contrary on January 12, 1956, H. D. Jensen and Threlkeld executed a contract with Yellow Motors Acceptance Corporation, wherein the "trade-in-credit" for the mill was reflected at \$4,000.00, only (518-519; Ex. "AO").

VII. THE COURT ERRED WHEN IT INSTRUCTED THE JURY THAT THE BURDEN OF PROOF WAS UPON APPELLANT TO PROVE APPELLEE "WILFULLY REFUSED" TO PRODUCE REQUESTED RECORDS (Specification of Error IX).

Under the express provisions of the policy, Appellee cannot recover until he has complied with all the requirements of the policy (Ex. 1). Policy lines 113-122 provide that insured "as often as may be

reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers or certified copies thereof if originals be lost at such time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.”

Appellee contends that unless Appellee wilfully refused to produce such records that it would not bar his recovery. In *Hickman v. London Assur. Corp.* (1920), 184 Cal. 524, 534, 195 P. 45, the Court expressly pointed out that by accepting the insurance contract the insured had agreed to the performance of the terms requiring the production of the records and “where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without his fault making it difficult or even impossible for him to perform”.

Insurance Code Section 533 has no application to the failure of an insured to comply with the policy records provisions. Such section is found in Chapter VI entitled “Loss” under Article II entitled “Causes of Loss”, where the Code defines “Proximate Cause” Sect. 530; “Peril not insured against” sect. 531; and “Specifically Excepted Peril”, Sect. 532. Section 533, reads:

“An insurer is not liable for a *loss caused by the wilful act of the insured*; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.” (Emphasis supplied.)

Clearly, the cause of this loss was fire and it was not caused by the subsequent failure to produce records.

Appellee further states "a showing of the impossibility of producing lost or destroyed records would excuse such performance". There was no evidence in the record which would show that all original invoices were destroyed or that copies could not have been obtained. Notwithstanding his statement that he "asked for suppliers invoices" the record shows that the following witnesses were not contacted by Appellee for invoices until a month before the trial of this action in the Lower Court: Harold J. Bertain (Simpson Redwood Company, formerly Eureka Redwood Lumber Company) (318, 326); Paul Henning, Manager, Rice Supply Company (301, 302); H. B. Whittet, Salesman for Western Door and Sash Company (271, 278). The trial court records show that Judge Carter permitted Appellee to take the deposition of such witnesses only upon the conditions that the invoices would be produced and shown to Appellant prior to such depositions. Contrary to Appellee's statement that no specific request for records were made by Appellant, the record shows that on October 3, 4 and 5, 1956, CPA Russell Stearns examined such records as Appellee would show him in the City of Eureka, but they did not include the records hereinafter mentioned (547, 548, 550). At the examination Under Oath of Appellee, Appellant called to Appellee's attention that certain records and invoices had not been shown Stearns; thereupon it was agreed by Appellee and his counsel that if Appellant would specify the records, Appellee would exhibit them to Stearns (209-210). On October 19, 1957, Appellant

listed and requested by letter that Appellee produce the following unproduced records: general ledger for the calendar years 1954, 1955 and 1956; accounts receivable ledger; combination cash and sales journal; all vendors invoices and statements for 1956; all sales invoices for 1956; all correspondence for 1956; all payroll records including the entire month of June, 1956; all cancelled checks of the Eureka Lumber Company for 1956, and all bank statements together with cancelled checks of Harold D. Jensen for 1955 and 1956 (Ex. AV, 547) but, Appellee still did not produce any of them.

There is no evidence in this record that any supplier other than Eureka Redwood Lumber Company, Rice Supply Company and Western Door and Sash Company was ever requested by Appellee to supply copies of invoices; or that any supplier refused or was unable to supply Appellee with invoices showing the merchandise purchased by Appellee and H. D. Jensen.

Appellee states "that no specific lists were made available (569)". The record shows to the contrary. At page 569, Appellee was cross-examining Stearns relative to the testimony of Stearns on direct examination that moneys were deposited from the Eureka Lumber Company into H. D. Jensen's bank account, and Stearns had asked for invoices to show the purchases of lumber as reflected by the amount of such deposits (559). Stearns replied that the cash books of Eureka Lumber Company recorded the money paid to H. D. Jensen; that in October, 1956, Stearns had asked Appellee's Counsel "for the invoices support-

ing the purchases that were shown as paid for to H. D. Jensen, per the cash book, which is right over there''; Stearns was told at that time that he had all the available invoices and any that showed up thereafter would be made available to him (569). However, such invoices were never made available to him, and he did not find any invoices in the records furnished him to support such purchases (560). Appellee offered no evidence to show that he had furnished the original of such invoices, or if the originals were destroyed that he had requested a copy of the invoices from the seller or that the seller was unable to furnish a copy of such invoices. In fact, the evidence shows that Mr. Hilger, who stated the records would be produced, did not tell Appellee to get the invoices for 1956 (207). Appellant was dependent upon Appellee and H. D. Jensen for the indentification of the sellers of the merchandise.

It is uncontradicted that following the fire, H. D. Jensen admitted that he had some of the books including the accounts receivable book at the home of Appellee where they lived together (546, 574, 575), which books, although requested, were never exhibited to any representative of Appellant (545, 550).

A. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN APPELLANT'S PROPOSED INSTRUCTIONS NOS. 3, 5, 4 RE: CONDITIONS PRECEDENT AND DUTY OF APPELLEE TO PERFORM.

Appellee has not criticized the form of these proposed instructions. While admitting the burden of

proof is upon him to prove performance of the conditions precedent, Appellee contends that the obligation to submit to an Examination Under Oath and to produce records is a condition subsequent and he does not have to prove compliance with a condition subsequent. The law of California is settled that these requirements must be met by the insured, and are a "condition precedent to any right of action" by the insured,

Hickman v. London Assur. Corp. (1920), 184 Cal. 524, 195 P. 45;

Robinson v. National Auto Ins. Co. (1955), 132 C.A.2d 909, 912, 282 P.2d 930.

Appellee has cited no authority to the contrary.

VIII. APPELLANT WAS ENTITLED TO CROSS-EXAMINE APPELLEE AS TO HIS KNOWLEDGE OF EUREKA LUMBER COMPANY STOCK INVENTORY AS OF THE CLOSE OF BUSINESS YEAR ON DECEMBER 31, 1955 (Specification of Error V).

The Court refused to allow Appellant to examine Appellee as to the amount of stock inventory at the close of business on December 31, 1955. In support of his contention that the amount of stock inventory at the close of business December 31, 1955 was irrelevant, Appellee cited two cases which are inapplicable. In *Meyer v. Parsons* (1900), 129 Cal. 653, 62 P. 216, there was no issue as to the amount of stock on hand at the time of the fire. In *Mayers v. Alexander* (1946), 73 C.A.2d 752, 167 P.2d 818, the issue was the reasonable value of real property; evidence was offered of

a particular sale; and the court ruled "market value cannot be established by evidence of a particular sale."

Here there is a claimed "out of sight" loss of approximately \$20,600 including 100,000 board feet of lumber (Ex. K, 248). In June, 1956, Appellee filed a financial statement with the Crocker-Anglo Bank, wherein the inventory at the close of business December 31, 1955, was stated to be \$15,478.11 (Ex. AY), and a financial statement to the same bank showed the inventory at the close of business on June 1, 1956, to be \$28,080.00 (571). Appellee did not know of any merchandise bought between June 1 and the fire on June 25th (200). Yet the Proof of Loss alleged the amount of stock as of June 25 to be \$63,599.54. If the financial statement was accurate as to the amount of inventory at the close of business on December 31, 1955, or on June 1, 1956, then the evidence would be proof that Appellee and H. D. Jensen exaggerated the amount of insurance in the Proof of Loss by more than \$35,000.00.

Therefore, knowledge of Appellee concerning amount of the inventory on hand at the close of business on December 31, 1955, was material to the defense of fraud.

IX. REFUSAL TO ADMIT IN EVIDENCE WRITTEN AGREEMENT EXECUTED BETWEEN APPELLEE, H. D. JENSEN AND OTHERS FOR EUREKA LUMBER COMPANY, WAS ERROR (Specification of Error VIII).

Appellee's contention that such documents would only be relevant or material after a "conspiracy" was proved and an act of arson established overlooks Appellee's right to recover was limited to amount of his interest in the stock, (Ex. 1, 60); under Insurance Code 381(c) Appellee was required to disclose the interest of all parties. In the Proof of Loss (Ex. K, Pr. 3), Appellee alleged the Company was the sole owner of the stock and denied anyone else had any interest. Concealment of the interest in H. D. Jensen could void the policy; it would be a ground, independent of conspiracy or employment, entitling Appellant to examine H. D. Jensen under oath; and it is material to supporting a finding of fraud, concealment and conspiracy on the part of Appellee.

X. CONCLUSION.

It is submitted that each error specified by Appellant constitutes prejudicial error when analyzed in the light of the record in the trial court and the existing case law. Appellee has failed to respond to legal principles and factual data sufficient to compel a reversal of this case.

Dated, San Francisco, California,

June 30, 1958.

Respectfully submitted,

AUGUSTUS CASTRO,

Attorney for Appellant.

No. 15,820

United States Court of Appeals
For the Ninth Circuit

BOSTON INSURANCE COMPANY,
a corporation,

Appellant,

vs.

HYRUM JENSEN, individually and doing
business as Eureka Lumber Com-
pany,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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PAUL P. O'BRIEN, CLERK

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an action on a California Standard Form Fire Insurance Policy (Ex. 1). The defenses urged were arson and conspiracy to commit arson, and concealment of the said arson, and fraudulent misstatement of inventory together with wilful failure to produce records.

At approximately noon on June 25, 1956 a fire occurred inside the building of the Eureka Lumber Company, the named insured (383, 408, Ex. U, 532, 533, 240, 241, 242). The fire apparently had a single point of origin at the floor level of the first floor in the southwest room (431, 432, 400-402), and it spread upward and outward to other parts of the building (433-437).

The northerly floor area of the southwest room showed deep-seated charring indicating the fire had started there (431, 432, 445, and 448). Near the point of origin, the firemen found an empty, open-topped five gallon container with a diesel fluid odor, and a fifty gallon drum containing some gasoline with its pump affixed. The gasoline was still unconsumed by fire (254). Ordinarily such room was used to store merchandise, such as asphalt shingles and plywood (101). Diesel fuel, cleaning solvents and gasoline were ordinarily kept on the premises for the operation and cleaning of machinery (254). There was merchandise and oil there as part of the regular stock in trade usually kept there (443). There was the usual amount of grease that accompanies mechanical work (442). There was a portable sawmill powered by diesel engine located in the southeast quarter of the west one-half of the building. In an area adjacent to the north and west sides of the portable sawmill the firemen found two open topped one gallon containers and a partially burned rag, all with diesel odors in the debris (418-420, 413-439, 454, Exs. Z, AA, and AJ).

At the scene of the fire and before entering the building during the fire the appellee exclaimed to the firemen, "I didn't know, I think somebody set it afire, we had better get an investigator" (114). The "I didn't know" quotation had reference to a response to a question as to how the fire started.

At about 12:05 p.m. the bookkeeper, Ellen Van Harpin, left the building leaving H. D. Jensen in the building (495) and earlier, H. D. Jensen had been

in and she saw H. D. Jensen in the southwest room (495, 526-528). Shortly thereafter H. D. Jensen was seen to leave the building and approach a customer, had a conversation with him and the customer saw Jensen walk away toward Third Avenue and up Broadway to get lunch (396-397). Apparently upon reaching Third and Broadway the witness Musser, whose office is at that intersection observed Jensen start his car, come up to Musser's place of business, stop, peer in and begin to get out, then Jensen observing that Musser was on the telephone, closed the door and drove away up Broadway. Witness Musser said, "He opened the door like he was going to get out, about a foot, I would say. And I was on the telephone and he closed the door. He must have shoved the foot throttle down to the floorboard and took off." And further, "the rate of speed wasn't very great, but the tires was sure going round" (262).

In a proof of loss executed by appellee, he stated he had no knowledge of the origin of the fire, fixed the total inventory of stock at \$63,549.54 and the loss at \$33,549.59 of which \$20,600.00 was claimed for the loss of 66,000 board feet of top grade redwood molding, 35,000 board feet of fence board (Ex. K., 248). Two electric motors listed in the inventory at \$600 and \$700 respectively were insured by Hill and Morton, Inc., by another insurance company with whom Hill and Morton, Inc. filed proof of loss and was paid under its policy (575, 186). Appellee knew nothing of any interest of Hill and Morton, Inc. or any claimed interest of Hill and Morton, Inc. and did not know that they claimed a fire loss (186-187).

The appellee had a good credit standing at the Crocker-Anglo Bank at the time of the fire (68, 70, 71). The appellee had made a net profit of approximately \$20,000 in 1955 (568). The property involved in the fire was under-insured and shortly before the fire the appellee was asked by his insurance agent to increase the insurance because the agent felt that it was under-insured, but that appellee did not increase insurance (61, 62). The appellee had only \$10,000 insurance on the building, whereas the purchase price and value thereof was approximately \$35,000 (76, Ex. 3, 127). There was machinery that was not insured under any policy which was of a mobile nature and which was often kept outside the building on the open storage area which machinery was destroyed by the fire and had a value of several thousand dollars (125, 126).

The office of the appellee was invaded by the fire (109, Ex. 10). Smoke billowed out of the office windows at the outset of the fire (113).

Fireman McBeth and others reported fire having invaded the office area (380).

Such records as were available were made available to the insurance carrier upon every demand. No demand was made until October, 1956. The appellee then produced his records which were wet and strung out, all over the building, partially rotted. Prior thereto many insurance representatives at many times had made reference to the records and access to them had never been refused by the appellee (121, 122, 123, 124).

The appellee requested copies of supplier's invoices (136). The biggest part of the records after the fire were rotted and wet (206). The appellee turned over all the records that he could find and of which he had knowledge (207). The appellee submitted to an examination under oath in October of 1956 and at that time counsel for appellee requested the appellant to make known any specific requests for records and effort would be made to obtain same (209, 210).

No list of specific items required was ever furnished (569). The only request made was a blanket request under a letter of October 19, requesting that all invoices, all records, etc. be produced. No records were ever refused the appellant (564, 565). The witness Van Harpin testified that she came in and saw the records piled on the floor but she did not look them over, did not open any files, or did not inspect the records (491).

SUMMARY OF ARGUMENT.

1. There is no sufficient substantial evidence to support a finding of arson. Therefore the Court properly withdrew the issue from the jury and properly excluded evidence of motive, conspiracy, fraudulent concealment of arson and false claim based on arson until after the basic ingredient, arson, was proved. It is the contention of the appellee that a finding that arson was properly withdrawn from the jury and not proved would dispose of specifications of error, numbers 1, 2, 4, 8, and 11, since all those specifications de-

pend upon a prior proof of arson before they become material.

2. In regard to Specification 3, the evidence is that all information received by appellee was passed on to proper insurance company representatives.

3. In answer to Specification 5, evidence of a quantity of inventory at December 31, 1955 was too remote and the Court properly excluded evidence thereof as having no bearing on an inventory evaluation six months thereafter.

4. In regard to Specification 6, the knowledge of Dayton D. Murray, Jr., of a sale of the sawmill was gained from the two principals, the buyer and the seller, and therefore did not constitute hearsay. There is no better source for information regarding a sale than the direct statements of buyer and seller.

5. In regard to Specification 7, the invoice was properly admitted in evidence by copy inasmuch as it was demonstrated that the original had come into existence, had in the ordinary course of business been sent to the appellee and that the appellee had lost the same.

6. That the instructions as covered in Specifications Nos. 9, 10 and 11 were proper as given by the Court and are supported by the law of the State of California. As to the failure to instruct under Specification 11-A, it is the position of the appellee that the proper opportunity was given to appellant to take exception to failure to instruct by consultation with both counsel and the Court in Court's chambers and

that at that consultation it was agreed that there would be no basis upon which the Court could instruct as to the issue of fraud of an employee being imputable to the employer and that at the conclusion of the conference the Court indicated its intention not to instruct. Should appellant have desired to take an exception, he could have done so of record after the Court's announced intention not to instruct.

7. In answer to Specification 12, the instruction given properly covered the duties, burdens and obligations of the parties to the action under California law.

8. That in answer to Specification No. 13, the Court properly denied the motion for directed verdict and for new trial, having already ascertained and having reexamined and again ascertained that none of the defenses of the insurance company were established as a matter of law, and that the defense of arson was not proved sufficiently to be submitted to the jury.

ARGUMENT.

I.

Arson, or incendiary nature of the fire, has not been proved by any substantial evidence, and the Court properly excludes consideration of the issue by the jury.

When property burns, the law implies that the fire was the result of accident or some providential cause rather than of criminal design. (4 *Am. Jur.* on Arson,

§ 42, page 105, LRA 1916 D, page 1299, and cases there cited to the effect that the presumption that the burning was accidental *must be overcome* (emphasis supplied).

It is possible of course to establish corpus delicti of arson or incendiary fire by circumstantial evidence just as it is in any other crime. However, such proof must satisfy the usual requirements in that respect, that not only must the circumstances be consistent with guilt or the commission of the crime but in order to sustain a finding of arson, the evidence must also be inconsistent with any other rational hypothesis. *People v. Lepkojes*, 48 C.A. 654; *People v. Angelopoulos*, 30 C.A. 2d 538.

Many cases have considered the sufficiency of evidence to establish arson by circumstance and the cases cited by appellant in his opening brief on this point have been carefully read and analyzed. Appellee has no fear for the comparison of the circumstances in this case to those found to exist in the cases cited by appellant. In *People v. Maas*, 145 C.A. 2d 69, the defendant confessed and admitted his incendiary act and accordingly only very slight establishment of the corpus delicti was required for the admission of his confession. No such circumstance exists in this case before the Court. In *People v. Becker*, at 94 C.A. 2d 434, the prosecution established the means by which the fire was set, established over-insurance, established that valuable household furniture and art work were removed from the building immediately prior to the fire, that the furniture claimed to have

been lost in the fire was later found stored in an apartment which the defendant had rented under another name. None of those circumstances are present in the case before this Court.

In *People v. Kasparoff*, 94 C.A. 7, the fire there appeared obviously of incendiary origin, there was over-insurance and there was a murder circumstance present to connect the defendant to the crime. None of those circumstances are present in this case.

In *People v. Gilyard*, 134 C.A. 184, women's clothing soaked in kerosene were found underneath a residence and spots of kerosene were found upon the clothes of defendant. The defendants were living in an illicit relationship, there were wide divergences between the physical evidence of the whereabouts of the defendants and the alibi story presented by them. There was evidence of over-insurance. None of those circumstances exists in this case.

In *People v. Kessler*, 62 C.A. 2d 817, the defendant conceded that the fire was of incendiary origin (page 819) and the only question before the Court there was the connection of the defendant to the criminal act. The fact that the door was locked and the defendant had the only key was of importance to connect the defendant with the crime, but was not considered as establishing the criminal act itself. Here there is no incendiary fire proved and the mere fact that doors might be locked does not become of importance.

Likewise, in *People v. Freeman*, 135 C.A. 2d 11, the appellant-defendant there conceded that the fire was

of incendiary origin (page 11). That likewise then became merely a problem of connecting the defendant with a proved criminal act.

And finally, the last case cited by the appellant in this connection, *People v. Hays*, 101 C.A. 2d 305, there were four separate fires, that each occurred at a location where the plaster had been broken and the interior of the wall made available to the flame, that there was over-insurance, that the defendant was seen carrying a jug of solvent into the unoccupied premises just prior to the fire, that she made evasive statements such as, "She was no fool and knew that she did not have to answer unless she wanted to," upon interrogation by the District Attorney. Here we have none of those circumstances. There was only one point of origin for the fire, nor were there any contents of the building unusual to its ordinary use, and there was certainly no over-insurance.

Let us examine to see if the circumstances in this case compare in any manner with any case the appellant has cited.

The insurance agent, Goldblatt, attempted to have the insurance on the property increased less than a month prior to the fire because of the extensive remodeling and additions to value that had been placed upon the property by the insured (61). Such increase was not made. The total insurance carried on the stock was \$20,000 which is the policy here in issue, and \$10,000 on the building, or a total of \$30,000. The purchase price paid by the appellee for the property

as revealed in the unpaid purchase money note to Anna Hess (76, Ex. 3) and the evaluation placed thereon by the insured which stands uncontradicted (127) and the remodeling added thereto afterwards indicate that the value of the building alone was in excess of the total insurance carried for both stock and building.

The fire occurred at lunch time, and it was customary for the place to be locked up during the lunch period as a matter of general practice (113, 245). The fact that the building was locked would be a normal, usual circumstance, rather than an unusual one.

When asked at the scene of the fire as to the cause thereof, appellee responded that he didn't know, he thought it was set and that an investigator should be called in (114). This is an exclamation made at the time of the fire and certainly the request that an investigator be put on the case is not the act of a person with a guilty conscience. Likewise, the statement made by appellee as per his testimony at 114 is not an outright statement of knowledge of just what took place, but is obviously an extemporaneous guess.

There was much uninsured equipment in the building at the time of the fire which could very easily and without suspicion have been removed. This consisted in main of mobile equipment used chiefly outside the building in the open lumber storage area of appellee together with other easily movable and uninsured items (125, 126). This uninsured equipment had a value of several thousand dollars.

The presence of diesel fuel, cleaning rags and gasoline in and about the premises is fully explained (254). Even the expert called by the appellant saw nothing unusual in the presence of inflammables at the scene of the origin of the fire (442). It is to be noted that the gasoline was still in the drum after the fire and according to the testimony of Expert McBeth, it was at the hottest part of the fire in the southwest room (254, 440).

The arson investigator, McBeth, testified fully as to the investigative procedure followed by him and stated at page 431 that he caused fragments at the point of origin of the fire to be sent to a laboratory in Sacramento, California for examination for additives or evidence of arson. Nowhere does the witness McBeth indicate that such examination resulted in positive findings. Had such findings been positive, it can be presumed that the appellant would have brought such information out. The appellant was in possession of the report or at least the appellant's witness was, and it can be presumed that the reason it was not pursued further was that the findings were negative. Reference was made to finding of fuel containers in the northeast or "Kaiser" room, but that there was no burning in this room at all (434). Reference was made to diesel can with cleaning rags therein found in the area adjacent to the sawmill, but the evidence of both McBeth (438) and the witness Jensen (not related to the appellee) indicates that there was no fire originating in that area (400).

The arson expert McBeth found nothing unusual in the grease or fuel conditions (442) and that all the inflammables appeared to be stock-in-trade items (443) and after his extensive investigation and testimony regarding the results thereof flatly states that he has no opinion as to what caused the fire (443). This is the appellant's own witness speaking. Certainly if the expert who testified from personal knowledge of having been present at the fighting of the fire and having made personal observation based upon expert knowledge and experience cannot form any opinion regarding the origin of the fire, then to ask the jury to do so would be dealing in pure conjecture and speculation. There was nothing by way of evidence offered by any of the other witnesses produced that would add anything to the testimony of the witness McBeth in this regard, and the Court properly concluded that the expert produced by the defendant was correct, that there was nothing upon which to base an opinion that the fire was of incendiary origin.

Boiled down, the only evidence in this case is that a fire occurred which had a single point of origin in an area where inflammables were usually and normally kept and that the inflammables which were open burned, and those which were closed did not. There was no evidence of any agency which might have caused the fire and while such agency does not have to be proved with exactitude, it seems but reasonable to require the appellants to at least produce some theory as to the manner in which the fire started. This they have not done.

Appellants attempt to establish the basic ingredient of arson by evidence which might be used to connect H. D. Jensen to the crime after it had been proved to have been committed. Such evidence consists of the opportunity of Mr. Jensen (not the appellee but his son) to have set the fire. H. D. Jensen's testimony is that he performed his regular work that morning which required his presence from 8 a.m. to 12 noon. The mere fact that he was there certainly is not an unusual circumstance. It would be more unusual if he were not performing his usual duties. H. D. Jensen, shortly before the fire, talked with a customer and then *walked* away toward Third and Broadway (396, 397). It is to be noted that he did not *fly* away as appellant would like us to believe.

Apparently H. D. Jensen walked from the customer to whatever location his vehicle was parked in, and drove south along Broadway to the intersection of Third and Broadway where he stopped at the place of business of the witness Musser and began to alight, when he observed that Musser was busy on the telephone, reclosed his door and drove off. Although Musser states that H. D. Jensen put the throttle to the floorboard, in the next sentence he is unable to describe the vehicle's speed as fast (262 and 261). However the witness Musser saw no fire or smoke until after he had seen H. D. Jensen leave (264).

In all reasonableness and fairness, it cannot be said that the behavior of H. D. Jensen in leaving the offices and coming over and carrying on a leisurely conversation with a customer on the lot of the appellee,

then walking to his parked vehicle, driving away, then stopping at Musser's and starting again is a description of wild flight from the scene of a crime. Why would H. D. Jensen have stopped to engage in conversation with the customer—why would he walk rather than run to his car—why would he stop in front of Musser's place of business if he were in wild flight? There is certainly nothing in the testimony of the customer to indicate any state of nervousness or agitation or indeed any unusual behavior of any description (Testimony of the customer as recorded at 396 and 397).

A comparison of the circumstances present in this case is invited to those present in the *People v. Angelopoulos*, 30 C.A. 2d 538, wherein the Court found as a matter of law that there was insufficient evidence to even connect the defendants with the incendiary fire. It should be kept in mind that in the *Angelopoulos* case it was conceded and admitted that the fire was of incendiary origin and the Court there held that the many circumstances proved merely were sufficient to arouse some suspicion but certainly not sufficient to support a finding against the defendants.

In *People v. Jenkins*, 67 C.A. 631, the Court considered the circumstances in that case and found them insufficient even to support the *slight* showing of corpus delicti necessary to permit the introduction of a confession.

Likewise, in *People v. Bispham*, 26 C.A. 2d 216, the Court once again considered the slight showing of

corpus delicti necessary to precede admitting a confession and found the circumstances inadequate as a matter of law and reiterated the well established doctrine that the weighing of the sufficiency of the evidence in a matter of this sort is primarily one for the trial Court in its wise discretion.

Finally, in *People v. Seltzer*, 107 C.A. 2d 627, the Court considered the circumstances that the property was over-insured, that the defendant had upon leaving the store prior to the fire taken the day's cash receipts with him instead of leaving them in a safe as was his usual practice, that the defendant had cleared the store of employees by making special request that they close promptly and offering to drive the employees home, that the burglar alarm which would have given some prior notice of the fire was left open, whereas the defendant had said that he closed the same, that the fire was obviously of incendiary origin and the arson expert called so testified, that after clearing the store of employees the defendant again reentered and his actions for a few minutes thereafter were unaccounted for, that fifteen minutes or so later the fire was discovered, and after considering the above circumstances, the Court asked itself the question, "Was there substantial evidence to sustain the verdict of guilty and the judgment predicated thereon?" and answers the question, "No." Certainly if there were insufficient circumstances in the *People v. Seltzer*, there is no question as to the insufficiency of the evidence to establish arson in the case at bar, and the Court properly refused to submit the issue to the jury.

While this is not a criminal proceeding, most of the argument and discussion has related itself to the description of arson as a crime, because after all, that is what it is. And inasmuch as it is a crime, it is a serious offense and should not lightly be charged in the absence of evidence as a coloring matter in the presentation of an insurance loss case. To have permitted it to go to the jury on the basis of the evidence introduced would have been prejudicial to the appellee and reversibly erroneous.

Disposition of the defense of arson, likewise disposes of the specification No. 2, regarding evidence of motive. It is so well established that evidence of motive is not admissible until the corpus delicti has been established that it does not require the citation of authorities. The question of motive not being material under the proof offered, evidence thereof was properly excluded. Many pages are taken up by questions asked by appellant's counsel which were properly objectionable and many pages of the Appellant's Opening Brief were taken up in evidence which he might have introduced, obviously as coloring matter again in the consideration of this case. Appellee did not belabor the Court below unduly, nor will it belabor this Court as to the evidence it would have introduced in rebuttal of any attempt on the part of appellant to show a poor financial condition here inasmuch as it is immaterial to any issue presented.

Likewise, the Specification No. 4 has to do with the conspiracy alleged to set fire and of course it is likewise immaterial until the setting of the fire or at least

an attempt thereto has been shown. It falls in the same category as motive. Until the criminal act or an overt act towards the commission of a criminal act is shown, then evidence of a conspiracy to commit the same is immaterial. *Code of Civil Procedure*, State of California, § 1870, subsection 6, 11 *Cal. Jur.* 2d on Conspiracy, § 32, page 257. The trial Court should require the proof of a conspiracy before permitting any evidence which would merely show acts done pursuant to the conspiracy.

The appellant having failed to prove a conspiracy or any overt act toward the setting of a fire was certainly not in a position to insist that he be permitted to cross-examine further on a question to which he had already received a rather emphatic answer. It would also appear that whether or not H. D. Jensen appeared for an examination under oath is somewhat irrelevant to the existence or lack of existence of a conspiracy. H. D. Jensen is not a plaintiff in this action against the insurance company and makes no claim under the policy, and under the policy provisions has no duty to appear for sworn examination. The policy by its terms (Ex. 1) requires *only* the insured to appear. Nowhere in the records does it indicate by any evidence that H. D. Jensen was an insured. It would appear that his failure to submit to a sworn examination was a matter of discretion with him and that he was under no duty to appear.

Likewise, Specification 8, has to do with an attempt to prove a joinder of interests between appellee and H. D. Jensen and would have relevance or materiality

only after a conspiracy were proved and an overt act of arson established. The basic ground upon which the Court sustained the objection to the document involved in the said specification was that, being a 1953 transaction, it was too remote to a 1956 fire. Whether or not such offered evidence is too remote to bear upon the issue is a matter of discretion for the trial Court to determine and will not be disturbed except upon a showing of abuse. *People v. MacArthur*, 125 C.A. 2d 212, at page 219; *Schomaker v. Provoo*, 98 C.A. 2d 738 at page 740; *Spolter v. Four Wheel Brake Service Co.*, 99 C.A. 2d 690 at page 699; Section 1868, *Code of Civil Procedure*, State of California.

Likewise, Specification 11 stands or falls upon the establishment of arson inasmuch as there is no basis for submitting the issue called for in the instruction set out in that specification if the issue of arson and the origin of the fire has already been determined favorably to the plaintiff. The basis of the instruction there proposed is that the appellee knew of the origin of the fire having set it, or conspired to set it, and since there was no proof offered upon which that issue could be submitted to the jury, the instruction was properly refused.

II.

The point raised in Specification 3 appears to be of trivial importance here. The appellee testified at pages 114 through 116 regarding receiving information concerning the fire and passing the same on to the proper authorities. There is nothing hearsay in the

revelation of this *act* of passing on the information to the proper authorities. There is no doubt but what the appellee would have been permitted to testify as to what he did with any information coming to his possession and the sum and substance of the testimony set out in this specification amounts to simply that. This point I perceive does not require further elaboration.

III.

In Specification 5 complaint is once again made upon a finding of the trial Court that an inventory figure some six months prior in time to the evaluation date involved in this case was too remote to bear upon the inventory present at the time of the fire. Once again the trial Court has the discretion to so determine, and his discretion is supported by the authorities heretofore cited under the discussion on Specification 8. In addition, as to the question of value at a given date, *Meyer v. Parsons*, 129 C. 653, holds that the value of stock of merchandise at any time other than the evaluation date is entirely irrelevant. In *Mayers v. Alexander*, 73 C.A. 2d 752, the Court holds as page 762 that evidence of value one year prior to the evaluation date was too remote. There is no showing here that the Court abused its discretion in excluding a book inventory figure some six months prior to the fire. Other evidence, including actual physical inventory at and after the fire was offered and in the face of such better evidence the Court was entirely justified in holding that other more remote evidence would not bear properly upon the issue of valuation as at the date of fire.

IV.

In Specification 6, exception is taken to the allowing of Dayton D. Murray, Jr. to testify as to his knowledge of a transaction wherein appellee sold a sawmill, destroyed in the fire, to Dayton Murray Truck Sales for \$7,500. The basis for the exception is that it is suggested that Mr. Murray the witness had no knowledge of the transaction. At page 336, Mr. Murray states, "I have no direct knowledge of the transaction. I have knowledge of it from discussions with Mr. Harold D. Jensen and with Mr. Threlkeld who is the previous manager of Dayton Murray Truck Sales." He further goes on to say that those discussions were in the course of conduct of the business of Dayton Murray Truck Sales. When it is kept in mind that the identity of the parties with whom the discussions were had were the manager of the buyer and the manager of the seller, they become the primary sources of knowledge concerning a transaction and are not hearsay. What better source for information as to the facts of a transaction can be obtained than the buyer and the seller?

Further the witness Murray stated on page 337 that his knowledge of the transaction was not only from discussions with the buyer and seller but from the documents recording the transaction as kept by Dayton Murray Truck Sales. Mr. Murray had previously testified that he had the documents recording this sale in his custody in his official capacity with Dayton Murray Truck Sales. Having official custody and control of the records of the company and having dis-

cussed their contents with the duly acting representatives of Dayton Murray Truck Sales and being familiar as a result of such information with the transaction, the witness Murray was perfectly competent to testify from the business records of Dayton Murray Truck Sales recording the transaction involved. In connection with Mr. Murray's testimony, foundation was laid as follows: "Question. Do you hold any office in Dayton Murray Truck Sales. Answer. I am presently the Secretary of that corporation. Question. In connection with your duties, do you have custody of the records and documents of Dayton Murray Truck Sales? Answer. I do. Question. Are you familiar at least in a general way with the transactions of the Dayton Murray Truck Sales? Answer. I believe I am, yes. Question. Are you familiar in particular with a transaction with the Eureka Lumber Company involving a sawmill? Answer. Yes, I am. Question. Do you have in your possession any records pertaining to that transaction? Answer. I have two documents that pertain to that transaction. I have a corporation copy of the invoice and a bill of sale. Question. These are a part of the regular business records of Dayton Murray Truck Sales? Answer. Yes, they are, they were in the file marked under the name of Eureka Lumber Company when I received the same (335 and 336). And on page 338: Question. Now you have testified that in your official capacity you have custody of the records and documents of the Dayton Murray Truck Sales. Answer. That's correct. Question. Mr. Murray, I hand you a Car Invoice

form, No. 205, bearing the heading Dayton Murray Truck Sales, bearing date of January 1, 1956. Did that document come from the regular records and books of the Dayton Murray Truck Sales? Answer. Yes, it did. Question. Was it prepared in the ordinary course of business? Answer. Yes, it was. Question. And were the—in the ordinary course of business, were those prepared at or about the time of the transaction they purport to reflect? Answer. Yes. Question. They form a part of the records of Dayton Murray Truck Sales that are in your custody, in your official custody with the Dayton Murray Truck Sales? Answer. Yes, that's correct."

Under those facts as foundation, testimony of Mr. Murray regarding what the records revealed and the introduction of the records themselves were fully justified under the Uniform Business Records Act. *Loper v. Morrison*, 23 C. 2d 600, at page 608; *Fox v. San Francisco Unified School District*, 111 C.A. 2d 885; *Richmond v. Frederick*, 106 C.A. 2d 541; *Patrick v. Tetzlaff*, 46 C.A. 243. The Court then did not err in allowing witness Murray to testify as to the transaction.

V.

Specification 7 objects to the admission of a copy of the invoice covering the truck sawmill transaction on the ground that it is not the best evidence. Judged even by the standards set forth in Appellant's Opening Brief, the document is clearly admissible. The original was sent to the buyer, Eureka Lumber Com-

pany and therefore was not in possession of Dayton Murray Truck Sales (341). The original was shown to exist inasmuch as it was received by appellee (99) and the original was lost or its whereabouts not known at the time of trial (99, 100). No further authority need be cited for the admissibility of this business record complained of.

VI.

In considering Specification 9 the complaint of appellant seems to address itself to the requirement that appellee *wilfully* failed to produce records or comply. And, secondly, that the defendant had the burden of proving such wilfulness.

In regard to the first matter, Section 533 of the Insurance Code of the State of California requires a wilful rather than a negligent act of the insured to exonerate the insurer. Appellant certainly does not deny the fact that substantial compliance with the provision to provide records or copies thereof would suffice for the performance of this condition subsequent. In other words a showing of the impossibility of producing lost or destroyed records would excuse such performance. Certainly counsel for appellant does not contend that he could make demand for all sales invoices of 1956 when \$530,000 of sales were involved, and then upon failure to provide one of the said sales invoices, complain of a non-compliance. Such provisions as are here involved are properly in insurance policies for the protection of the insurer and require all *reasonable* compliance by the insured.

Reasonable compliance would mean the attendance upon all examinations under oath as requested. In this case, there is no contention that the insured, H. M. Jensen, the appellee, refused or failed to appear at any examination or that upon his appearance he refused or failed to answer any questions put to him, relevant or irrelevant. Nothing in the policy requires any agents or employees of the insured to appear for examination such as was requested by the insurance carrier. And wisely is such a provision omitted. Employers cannot always require employees to appear and testify and if it should develop that in the event of a fire such employees' appearance was requested by the insured and the employee refused to go and testify, the insured would thus be done out of his insurance through an agency over which he would have no control.

The only complaint as to the failure to comply with the requirement that the insured attend upon and answer questions at a sworn examination and that he produce all records and copies thereof relates itself to the latter requirement. There is a divergence of testimony on whether or not this was complied with. The testimony of the appellee states that the office was invaded by fire (109, Ex. 10), that smoke was seen billowing out of the office (113), that upon the initial formal demand for sworn examination and records he made himself and his records available; that prior to such formal demand he had made his records, such as they were, available to all insurance representatives and adjusters and never refused access to any records

(121 through 124); that he asked for supplier's invoices (136); that the biggest part of his records were rotted and wet (206); that he turned over all records he could find (207); and through counsel agreed to comply with any specific request (209, 210); that no specific lists were made available (569).

That testimony, standing alone, fully supports a finding that all records within the power of the insured to produce were produced on demand and on repeated occasions and that no refusal to make records available was ever given.

The appellant claims no refusal but seeks to establish a failure by introducing a letter of the shotgun type designed to encompass the entire field calling for production of copies of books known to have been destroyed, together with copies of all third party records, some of which were not available to the appellee. Whether or not there was a compliance with the duty to produce records was a question of fact for the jury and which was submitted to them for decision.

The instruction under which it was submitted placed on the defendant the duty to establish his defense in this connection. We have previously discussed the fact that the defense would depend upon a wilful non-compliance or intentional non-compliance. There is little doubt that this being a matter of affirmative defense which would have to be pleaded by the defendant to be available to them, the jury was properly instructed that it was the burden of the insurance company to prove such defense.

The policy itself provides that the duty to submit to sworn examination and produce records is a condition subsequent which does not arise until after loss has occurred and that it does not appear as a condition precedent to loss, nor to suit. The best evidence of this is the provision of the policy itself which provides: "That failure either to produce such documents or to submit to such examination under oath constitutes a complete *defense* to any action on the policy" (emphasis supplied). This being a matter of defense, it must be pleaded and proved by the defendant. 28 *Cal. Jur.* 2d on Insurance, §599, page 368. In proving this defense certainly the defendant-appellant would be required to show a wilful non-compliance as required in Section 533 of the Insurance Code, and would also be required to show that the non-compliance was substantial and material. This provision in the Standard Fire Insurance Form is not designed to be a trap for the unwary, but certainly contemplates only culpable refusal on the part of the insured.

The cases cited by appellant in this connection all seem to concern themselves with an outright refusal to submit to an examination under oath and a refusal to produce records known to be available to them and which they admit to be available to them. The case of *Rizzutto v. National Reserve Insurance Co.*, 92 C.A. 2d 143, is inapplicable here, inasmuch as it discusses a condition precedent as to which of course the insured would have the burden of proof. Here there is no doubt but that the loss occurred under the terms of the policy and within the risks covered. Any plea by

way of confession and avoidance or failure to perform a condition subsequent is a matter of defense to be proved by the insurer.

VII.

Specifications 10 and 11 both have to do with the refusal to give appellant's proffered instructions on fraud and concealment, and misrepresentation. These can be treated in one argument.

First of all, there is no evidence in the case relating to any concealment or alleged concealment, no showing of any fact coming to the attention of the appellee which he neglected to communicate to the insurer. There being no evidence on which to submit this issue to the jury, it was properly refused.

Regarding misrepresentation or fraud, the Court instructed the jury as follows on pages 588-589: "If the jury should find from the evidence that the plaintiff purposefully and deliberately padded or exaggerated his claim to a material extent in order to cheat or defraud the insurance company, the plaintiff cannot recover, but any difference between the amount claimed and the actual amount of the inventory if there be such a difference cannot be considered as the basis for debarring recovery if such differences are the result of honest evaluation or based upon conflicting or differing opinions as to the amount and value. The burden of proving any alleged wilful or fraudulent padding of his claim by the plaintiff rests upon the defendant." This adequately submitted to the jury the issue of fraud in the filing of the proof of loss in

the amount of loss claimed therein as compared to any actual loss or any misrepresentation to the carrier. It placed properly the burden of proof inasmuch as this is an affirmative defense and one which the appellant concedes he has the burden of proving (appellant's proposed instruction No. 24). *Helbing v. Svea Insurance Co.*, 54 C. 156; *West Coast Lumber Co. v. State Investment and Insurance Co.*, 98 Cal. 502; *Miller v. Fireman's Fund Insurance Co.*, 6 C.A. 395; *Hyland v. Millers National Insurance Co.*, 91 Fed. 2d 735; *Clark v. Phoenix Insurance Co.*, 36 C. 168.

As to the query of the jury during its deliberations as to the imputation of fraud to an employer, it has heretofore been observed that such inquiry was discussed by both counsel and Court in chambers and the Court after full discussion with counsel stated its intention not to comply with a request for instruction on that basis since it would be but the statement of an abstract principle of law. Counsel for appellant and appellee offered no better solution to the Court and the record is devoid of any exception noted to the failure so to instruct.

VIII.

Argument as to Specification 12 has been covered amply in the discussion of Specification 9 and nothing further need be added here.

IX.

Specification 13 warrants no discussion, having been fully covered in the discussion of the previous specifications.

CONCLUSION.

Appellee submits that the appellant has submitted no grounds requiring reversal of this judgment nor of the action of the trial Court. There is no circumstance shown sufficient to warrant any reasonable inference of arson and as a result of that fact, no reason to consider any evidence of motive or conspiracy in relation thereto. All such matters were properly excluded from the trial and from the consideration by the jury. The jury was properly and fully instructed on the real issues of the case both as to the degree of proof required, the points required to be proved and the respective burdens of proof.

Wherefore appellee respectfully urges the affirmance of the judgment.

Dated, Eureka, California,
May 23, 1958.

Respectfully submitted,
FREDERICK L. HILGER,
Attorney for Appellee.

No. 15,820
United States Court of Appeals
For the Ninth Circuit

BOSTON INSURANCE COMPANY,
a corporation,
Appellant,

vs.

HYRUM JENSEN, individually and doing
business as Eureka Lumber Com-
pany,
Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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No. 15,820

United States Court of Appeals For the Ninth Circuit

BOSTON INSURANCE COMPANY,
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vs.

Appellant,

HYRUM JENSEN, individually and doing
business as Eureka Lumber Com-
pany,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS.

I. Jurisdiction of the Court.

This is an appeal from the judgment on a verdict for the plaintiff after a trial in the United States District Court of the Northern District of California, Northern Division, before the Honorable Louis E. Goodman, Judge, in an action to recover for a fire loss on a policy of fire insurance issued by defendant.

Jurisdiction of the cause below was founded on the diversity of citizenship, amount in controversy and pursuant to 28 U. S. Code, Sections 1332-1441. The pleadings show that Hyrum Jensen, plaintiff and Harold D. Jensen, third party defendant, each was a citizen of the State of California, while defendant was a corporation organized under the laws of a state

other than California, authorized to do insurance business within the State of California; and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 (1, 4-6, 8, 11, 20, 22).

II. Pleadings.

The pleadings consist of a verified complaint of Appellee, Answer and Third Party Complaint of Appellant, and Answers to Third Party Complaint by H. D. Jensen and Appellee, respectively.

A. In his verified *complaint*, Appellee Hyrum Jensen, as an individual doing business as Eureka Lumber Company, alleged: his residence in Humboldt County, State of California; compliance with user of fictitious name California Statutes; on May 21, 1956, Appellant issued a standard form of fire insurance policy to Appellee (a copy was attached as Ex. A to the complaint), wherein Appellant insured Eureka Lumber Company against loss by fire to stock up to \$20,000.00; on June 25, 1956, a hostile fire damaged Appellee's stock; thereafter Appellee complied with covenants and conditions on his part to be performed, including the filing of a verified proof of loss on August 23, 1956, wherein the loss was alleged to have exceeded \$20,000.00; Appellee demanded an appraisal,¹ but Appellant refused to appoint an appraiser; and that Appellant is indebted to Appellee in the sum of \$20,000.00 together with interest and costs (3-6).

B. In its *Answer*, Appellant admitted: its corporate capacity according to the laws of the State of

¹Neither the trial nor this Appeal involved issue of appraisal.

Massachusetts, authorization to transact fire insurance business in California and Appellee's California residence; execution of the fire insurance policy to Eureka Lumber Company (hereafter referred to as "Company"), but not Appellee; fire occurred on June 25, 1956, damaging some stock; proof of loss was filed and said sum of \$20,000.00 was demanded but not paid (10-12). Appellant denied that Appellee complied with the conditions on his part to be performed (11); and, in this connection, Appellant alleged Appellee failed to comply with Lines 113 to 122, of the policy, requiring the insured to produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost (14-15) and to submit H. D. Jensen for an Examination Under Oath (16); Appellee and H. D. Jensen entered into a conspiracy to defraud Appellant by setting said fire and by filing a false Proof of Loss; pursuant to the conspiracy H. D. Jensen set said fire, furnished the information for and Appellee filed a false proof of loss, wherein he denied knowing the cause of the fire or that there was any change in the exposure of the stock, and overstated the amount of the stock and damage thereto; and thereafter Appellee refused to produce said books, bills, invoices and vouchers, or copies thereof, and H. D. Jensen refused to submit to an Examination Under Oath (17-19); and that H. D. Jensen was a real party in interest (19).

C. With permission of the trial court, Appellant filed a *third party complaint*, wherein Appellee and H. D. Jensen were named as third party defendants,

and Appellant alleged: pendency of the subject action; said residence of the parties; execution of said fire insurance policy to Company; said fire and the conspiracy; and a right to recover over against Appellee and H. D. Jensen in the event Appellant was required to pay Company (7-10).

D. In their respective Answers to the *Third Party Complaint*, Appellee and H. D. Jensen admitted all the allegations of the Third Party Complaint, except each denied the corporate capacity of Appellant, the conspiracy, the setting of the fire, fraud or that Appellant would be entitled to recover from them (20-22; 22-24).

STATEMENT OF THE CASE.

This is an action on a California standard form fire insurance policy (Ex. 1). Appellant contended that Appellee breached the express conditions of such policy relating to the requirements to be performed including production of books and other records and H. D. Jensen submitting to an examination under oath; and Appellee and Third Party Defendant H. D. Jensen committed fraud, concealment and false swearing, relating to material facts and circumstances, such as the insurable interest of H. D. Jensen in the stock, failure to produce books and invoices, to submit to an examination under oath, knowledge of the time and origin of the fire (incendiary) and a fraudulent proof of loss; and they conspired to defraud Appellant by setting said fire and submitting a false proof of loss.

Shortly before 12:21 P.M. on June 25, 1956, a fire occurred inside the locked building of the Eureka Lumber Company (383, 408, Ex. "U", 532, 533, 240, 241, 242). The fire originated at the floor level of the first floor in the southwest room (431, 432, 400-402), and it spread upward and outward to other parts of the building (433-437).

After the fire, the northerly floor area of the southwest room showed deep seated charring, indicating that an inflammable fluid had been applied to the floor (431, 432, 445-448). At the point of origin, the firemen found an empty open topped five gallon container with a diesel fluid odor, and a 50 gallon drum containing some aviation gasoline with its pump loosely affixed, permitting gasoline fumes to escape (440). Ordinarily, such room was used to store merchandise, such as plastic shingles and plywood (101)—not diesel fluid or gasoline. There was a portable sawmill located in the southeast quarter of the west $\frac{1}{2}$ of the building. In an area adjacent to the north and west sides of the portable sawmill, where Appellee claimed and testified that he stacked top grade redwood molding (141-145, 150-159), the firemen found two open topped one-gallon containers and a partially burned rag all with diesel odors in the lumber debris (418-420, 437-439, 454, Ex. Z, "AA", "AJ"), and a fireman encountered a "stubborn fire" where the one gallon containers were found (386-389). At the scene of the fire, Appellee stated he believed somebody set the fire (114).

About 12:05 P.M. bookkeeper Ellen Van Harpen left the building leaving H. D. Jensen alone in the building (495), and earlier H. D. Jensen had been in and she saw H. D. Jensen in the southwest room (495, 526-528). Shortly before the fire alarm sounded at 12:21 P.M., H. D. Jensen was observed fleeing from the direction of the building (260-264) and H. D. Jensen has admitted he was in the building until 12:15 P.M. (529).

In a Proof of Loss executed by Appellee, he claimed he had no knowledge of the origin of the fire, fixed the total inventory of stock at \$63,549.54 and the loss at \$33,549.59, of which \$20,600 was claimed as "out of sight loss", including 66,000 board feet of top grade molding, 35,000 board feet of fence board (Ex. K, 248). Three employees familiar with the alleged storage area where Appellee described such molding and fence boards were stacked estimated the maximum quantity at 2,000 board feet of miscellaneous pieces of lumber (354, 357, 360, 370-371, 492-494, 505). Two electric motors listed in the inventory at \$600 and \$700 respectively were insured by Hill & Morten by another insurance company with whom Hill & Morten filed a Proof of Loss and was paid under its policy (575, 186). A set of planer heads and knives, for which \$590.00 was claimed were not damaged (184, Ex. G), and metal plumbing items were useable after the fire (183), but were not taken care of (469). Retail prices were used in the Proof of Loss, not wholesale prices which were available to Appellee (467, 468). The 200 squares of plastic

shingles listed on the Proof of Loss should have been found after the fire, because they were wrapped with paper and bound by wire, but only six or seven squares were found (464, 465).

Appellee and H. D. Jensen had a financial motive to conspire to defraud Appellant. H. D. Jensen was Sales Manager and Appellee was General Manager of the business which was taken over in 1953 (230). H. D. Jensen was in Bankruptcy in 1955 (232). The Company's business had been poor since the fall of 1955 (225), and the business was H. D. Jensen's principal source of income (234). Considerable money was owed by Appellee and the company to creditors at the time of the fire (225). Checks drawn on H. D. Jensen's account were not being honored because of lack of funds (233). Three days before the fire Appellee's bank account, which was used as a company bank account, was attached by a creditor and closed for insufficient funds (202). The Court excluded other evidence offered to show a financial motive (203, 498, 501, 499, 500, 233, 498, 502, 523, 524, Ex. "AR", Iden. Ex. "AS", Iden. 560-564).

Appellee and H. D. Jensen conspired to defraud Appellant by setting such fire and filing said Proof of Loss. H. D. Jensen lived at Appellee's house (232, 233, 77, 282, 288). He was Sales Manager of the business, and Appellee acted as General Manager, working in the yard remanufacturing, sorting and loading lumber. H. D. Jensen was in charge of the books, sales and finances of the business (137, 230, 231, 572-574), and arranged for fire insurance (61).

Monies of the business were deposited in H. D. Jensen's account following his bankruptcy (232, 234, 559, 560). About ten days before the fire, he prepared and Appellee executed a false financial statement given to the Crocker-Anglo Bank for a loan (195, 198, 201, Ex. "AY", 571, and he conducted his personal business through the company (234).)

The morning of the fire other employees who reported for work were sent away (370, 494, 528-529). Shortly before the fire, Appellee took H. D. Jensen's eight year old son and his playmate away from the premises for lunch, leaving H. D. Jensen alone at the premises (245, 429, 113). Immediately following the fire, H. D. Jensen took charge of the records and inventory (237, 238); he gathered the information for and checked out the Proof of Loss before it was executed by Appellee (135, 224, 525, 526). Appellee denied knowledge of the books (223), or the amount of merchandise (224). After the fire H. D. Jensen operated under the name of the Company (235) and Appellee tried to transfer Company trucks to him (236).

After the fire, learning of the incendiary nature of the fire, the opportunity of H. D. Jensen to set the fire, his flight from the scene, the claimed inventory was grossly exaggerated, the interest of the named insured was uncertain, the books and records of the Company relating to the "out of sight" loss were being withheld, Appellant requested Eureka Lumber Company, Appellee and H. D. Jensen to produce books of account, invoices and other records of the

company for inspection and Appellee and H. D. Jensen to submit to an examination under oath (Ex. AU, 547, Ex. AV, 547, Ex. H, 205, 208). A complete set of books, records and invoices were kept by the Company and were intact after the fire (221, 487, 491). Although Appellant gave proper written request for the production of said records and for H. D. Jensen to submit to the Examination under Oath, material invoices and books were not produced (545, 548, 549, 550), and H. D. Jensen did not appear for an Examination Under Oath (217, 210).

The questions involved in this appeal and the manner in which they are raised are as follows:

1. The right of the trial Court to take from the Jury, said issues of fraud, concealment and conspiracy to defraud by acts and omissions of Appellee and H. D. Jensen, including the right of Appellant to recover back under the third party complaint. On its own motion, the trial Court took the issue of said incendiary fire and said conspiracy from the Jury upon the grounds that there was no substantial evidence to show a conspiracy to set this fire; and the Court did not submit to the Jury the issues of fraud and concealment, relating to the origin of said fire and the failure of H. D. Jensen to submit to examination under oath, and of said conspiracy to defraud by filing a false Proof of Loss or the right of Appellant to recover under the third party complaint.

2. The exclusion of evidence of the financial condition of Appellee and H. D. Jensen on the ground that there was no substantial evidence of an incendiary

fire, was raised by rulings of the trial Court sustaining objections to questions and offers of proof by Appellant on this subject.

3. The admission of hearsay testimony of Appellee and of Witness Dayton Murray, Jr. was raised by the trial Court overruling Appellant's hearsay objections.

4. The refusals to allow Appellant to cross-examine Appellee concerning his knowledge and part in causing H. D. Jensen not to appear and submit to a scheduled examination under oath and the closing inventory for the calendar year 1955, on the ground that such matters were immaterial, were raised by rulings of the trial Court sustaining objections to questions and offers of proof by Appellant on these subjects.

5. The admission of secondary evidence of an invoice without the laying of any foundation was raised by the trial Court rejecting Appellant's objection that the invoice was not the best evidence.

6. The refusal to admit written evidence pertaining to the issues of insurable interest, conspiracy and performance of policy provisions was raised by the trial Court sustaining Appellee's objection to the document, on the ground it was too remote.

7. The refusal of the trial court to instruct on the following issues:

(a) The Fraud and Concealment provisions of the policy;

(b) Fraud and Concealment as to knowledge of the origin of the fire;

(c) Fraud of the employee imputable to the employer;

(d) Appellant's right to examine under oath, and Appellee's burden to prove compliance with the requirements of the policy;

was raised by exceptions noted to the refusal of the instructions except as to the imputation of fraud to the employer to which no opportunity to except was given.

8. The error in instructing the Jury that Appellant had the burden to prove that Appellee "wilfully failed" to produce books and records was raised by Appellant excepting to such instruction.

9. The error in denying Appellant's motions for directed verdict, Judgment N.O.V. or in the alternative for New Trial was raised by the trial Court's denial of each of these motions.

SPECIFICATIONS OF ERROR.

Appellant urges that the trial court erred in:

- I. REFUSING TO SUBMIT TO THE JURY THE DEFENSE OF AN INCENDIARY FIRE AND THAT APPELLEE AND H. D. JENSEN ENTERED INTO A CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND BY FALSIFYING THE QUANTITY, VALUE AND DAMAGE OF THE STOCK IN THE PROOF OF LOSS (499-503).

After the Court informed Counsel that this defense would be taken away from the Jury (501), on its own motion, the Court stated to the Jury:

“The defendant has urged as a special defense in the pleadings on file here that the plaintiff set or conspired to set the fire. This charge was made in writing in defendant’s answer and was urged by defendant’s counsel in his opening statement to you at the beginning of the trial. Ladies and gentlemen, this is a serious charge and amounts to charging the plaintiff with the commission of a crime, to wit, a felony. Such a serious charge should not lightly be made. I instruct you that as a matter of law the defendant has failed to present any substantial evidence to sustain such a charge, nor is there any substantial evidence from which an inference as to the truth of such charge can be drawn. Therefore, it is my instruction to you to disregard the claim of the insurance Company in this regard, and you should not consider it in any way in determining the issues in this case.” (590).

At the trial Appellant urged there was substantial evidence to show the incendiary origin of the fire (500).

II. EXCLUDING EVIDENCE OF THE FINANCIAL CONDITION OF APPELLEE AND H. D. JENSEN OFFERED BY APPELLANT TO SHOW A MOTIVE ON THEIR PART TO COMMIT FRAUD AND CONCEALMENT, TO SET THE FIRE, AND TO FORM SUCH CONSPIRACY TO SET THIS FIRE AND FILE SUCH A FALSE PROOF OF LOSS.

The trial court ruled that there was no question of motive involved, and motive was immaterial as follows:

A. *In cross-examination of Appellee, Appellant was prevented from covering:*

1. *Whether there was insufficient money to meet his checks.* Appellee objected:

“I object to that.”

The Court sustained the objection, stating:

“I will sustain the objection. Counsel, this is not a proper subject of inquiry in this case at this time. A man could be bankrupt and still have a perfectly legitimate claim for fire loss against an insurance company. The only question involved is, What is the validity of his claim? Not whether he is a poor man or a rich man. I will hold this whole line of inquiry, which I have ruled on before, is immaterial².” (233-234).

Earlier, Appellant urged that the financial condition of Appellee was admissible to prove motive (203-204). Later, its admissibility was urged by Appellant on the ground of motive and the further ground of falsification (501).

If Appellee denied that there were insufficient funds in his bank account, Appellant would have offered evidence that the checks were being returned for insufficient funds (Witnesses Ellen Van Harpen (502); Russell M. Stearns (559-562)).

2. *Financial Condition of H. D. Jensen:*

“Q. Did Harold Dee Jensen run into financial difficulties in that operation on the Hansen Road?

A. I don't know.

²To the contrary are:

People v. Richard (1951) 101 C.A.2d 631, 225 P.2d 938;

People v. Hays (1950) 101 C.A.2d 305, 225 P.2d 600;

People v. Freeman (1955), 135 C.A.2d 11, 286 P.2d 565.

Mr. Hilger. I object to that as going too far afield, your Honor, incompetent, irrelevant and immaterial.

The Court. I will sustain the objection." (226).

B. *In the direct examination of Ellen Van Harpen*, Appellant urged the following questions 1 to 4, inclusive, were admissible to show motive and falsification (501), but the Court sustained an objection to each question.

1. *Whether she knew if H. D. Jensen's checks were honored when presented to his bank*. Appellee's objection was: "I will object to that as being incompetent, irrelevant and immaterial as to what the bank might have done with the checks." The Court sustained the objection, stating: "Sustained. I do not see what that has to do with this case." (498).

2. *Whether she knew of any checks being held at the bank awaiting a deposit of monies in H. D. Jensen's account* (498). The following objection by Appellee was sustained by the Court:

"Q. (By Mr. Castro) Did you have any knowledge of any checks being held at the bank awaiting monies to be deposited in the account of Harold Dee Jensen?

Mr. Hilger. I will object to that likewise as being incompetent, irrelevant and immaterial and not having anything to do with this case.

The Court. So far as I can see that is correct.

Mr. Castro. We are offering this evidence on the basis again of motive, your Honor.

Mr. Hilger. What?

The Court. I will sustain the objection. I can't see any question of motive involved as yet in this case." (408-409).

Ellen Van Harpen would have testified that checks were not honored and were held by the banker drawee pending a deposit of money to cover them, Appellant would have proved that deposits into H. D. Jensen's account had been stopped because of insufficient funds to cover outstanding bad checks held by Lumber Wholesalers (502-503).

3. *Whether any accounts were due the Lumber Wholesale Company?* The following objection by Appellee was sustained by the Court:

"Q. (By Mr. Castro): At the time of this fire was there any accounts due the Lumber Wholesale Company?

Mr. Hilger. Objection. Incompetent, irrelevant and immaterial to any issue in this case at this time.

The Court. I will sustain the objection as to any financial status of the concern on the same ground on which I heretofore ruled in connection with similar questions." (499).

Ellen Van Harpen would have testified Eureka Lumber Company owed Lumber Wholesale Company approximately \$18,000.00 (503).

4. *Whether any creditor was at the Eureka Lumber Company office concerning the payment of the account he held* (499). The following objection by Appellee was sustained by the Court:

“Q. (By Mr. Castro). On the morning of this fire was any creditor of the Eureka Lumber Company at the office concerning the payment of his account?

Mr. Hilger. That is objected to as incompetent, irrelevant and immaterial at this stage of the proceeding; the same line of questioning.

The Court. Sustained. I want to make it clear that I am only ruling on this evidence at this time.

Mr. Castro. Perhaps I do not quite understand what your Honor is saying.

The Court. You can't prove motive of something until you have first brought in the corpus delicti, as it were; because somebody has a creditor or his aunt is sick you can't bring that in as evidence of arson. You first have to have some foundation for it.

Mr. Castro. Well, we have proved here—I would like to discuss it with your Honor. I would like to discuss the problem in front of the jury.

The Court. I think it is quite clear to me that the testimony is not admissible at this stage of the case.

Mr. Castro. Then I would like to make an offer of proof, because Mrs. Van Harpen is going back to Eureka this evening, your Honor.

The Court. All right. It is a little past 3:00. The jury can go out for its recess now and I will hear your offer of proof. (499-500).

(The jury left the courtroom and in their absence the following occurred:)

Mr. Castro. Concerning the foundation I would like to state this to the Court: That accepting the testimony of the plaintiff as true and

correct, that he had redwood moldings stacked in the areas that he has indicated, that in the center of those areas were found the two cans of inflammables in high priced molding of \$220,000, there was evidence that in the room where the fire is said to have originated, not only by the opinion of the witness this morning but also by Neil Jensen, who saw the fire in the area, that there was evidence on the flooring of the room that flammable liquids had been placed in the floor area, I think from that evidence the jury can infer or make a finding on circumstantial evidence of arson. We can go one step further and connect Dee with it through his conduct as observed by the witness Musser fleeing the scene. That is the foundation from the arson standpoint. (500).

The Court. Have you any other evidence along that line except what you have already presented which you intend to present?

Mr. Castro. Not along that line. I think I have presented everything I know of at this time.

The Court. On the basis of the evidence that has been presented I would take that issue away from the jury. I say that to you unequivocally because in my opinion there isn't the slightest evidence that would justify the cross-complaint in this case, nor any evidence from which an inference could be drawn. There is only your argument and your statements. There is nothing excepting the question of the amount of redwood. Of course, that goes to the amount of the claim, and on that there is some conflict. That is an issue for the jury to determine.

Mr. Castro. The question of motive, and that element of the case is just as important as on the

arson end of it, and they have designated 101,000 board feet of lumber in there.

The Court. That may be a question of the correctness of the claim. You can argue that to the jury.

Mr. Castro. And the financial circumstances concerning their background at the time of the loss is certainly evidence of motive and falsification.

The Court. I can't see anything that would justify submitting that issue to the jury. There is nothing by way of motive that would justify the submission of that to the jury as far as I can see. I have listened to the testimony very briefly. (501). If you have no more evidence on it, I would instruct the jury to take that issue from the jury, and I might even go further in my instructions to the jury, counsel. I do not think the charge of arson, which is a charge of a felony, can be lightly made by an insurance company against a businessman unless they know what they are doing when they file the charge, and it can't be used as a method of defense to a claim unless there is some substantial evidence from which some inferences can be drawn, not because it is a moral question, that he hasn't got much money, not doing much business, may owe² some money, and they have some cans³ in their place of gasoline or other inflammable material which are used there. Somebody sees a man drive an automobile and he is driving a little fast.³ Those are

³Circumstances from which jury could infer fraud, conspiracy and incendiary fire:

Brooks v. E. J. Willig Truck Co., (1953), 40 Cal.2d 669, 255 P.2d 802—flight;

People v. Gilyard (1933) 134 C.A. 184, 25 P.2d 35—kerosene.

not things from which justification can be drawn for the proof of what amounts to a felony. I wish to make myself quite clear to you at this point. That is why I asked the question the other day as to whether there would be any other evidence along that line, because I do not want to prejudge that question, but on the basis of your laying the foundation for the question to this witness, you might just as well know what I think about the evidence on the subject so far.

Mr. Castro. I offer to prove by this witness that the account referred to in the name of Harold Dee Jensen, the deposits into such account have been stopped by the Eureka Lumber Company, because there were outstanding bad checks against the account, (502) for which there were insufficient funds to cover after they had been issued; that the Lumber Wholesalers had such checks; that the account in the name of the Lumber Wholesalers was approximately \$18,000; that on the morning of the fire the Northwestern Pacific representative had been in their office for the collection of a delinquent account, a thousand or in excess of a thousand dollars, which was promised to be paid that afternoon, and there was no cash in either bank account to cover that obligation. Those are the items that I wish to prove and that I believe this witness would testify to.

The Court. I would hold that that is not admissible in proof of the claim made in the course of the defendant's case. It might justify the plaintiff committing suicide, having a holdup, or any of a number of a thousand things, but motive does not prove offense. There might be a motive

for the plaintiff in the case to do many things if he was in sore straits, but that does not supply the evidence that is needed to prove a charge of arson. So I will hold that the evidence is incompetent, irrelevant and immaterial at this stage of the case.”

Ellen Van Harpen would have testified that on the morning of the fire a representative of Northwestern Pacific Railroad Company came to collect a delinquent account of more than \$1,000.00, and H. D. Jensen promised to pay in the afternoon; further, that there was no money in either the bank account of H. D. Jensen or Appellee to pay the indebtedness (503).

C. *As to a delinquent account or dishonored checks at Yellow Manufacturing Acceptance Corp.* In the direct examination of Richard Hanna, a representative of Yellow Manufacturing Acceptance Corp., (a finance company for General Motors (342) which held the finance contract on the truck and trailer the Company was purchasing from Dayton Murray Truck Sales on which the portable sawmill was a trade in) Appellant asked whether the account was delinquent on the date of the fire, or, whether he was holding any checks of Appellee which had not been honored on the date of the fire (523). The following objections by Appellee were sustained by the Court:

“Q. (By Mr. Castro). Was this account on this particular truck delinquent at the time, June 25, 1956?

Mr. Hilger. I object to it as incompetent, irrelevant and immaterial and cite that as misconduct.

The Court. Which contract?

Mr. Castro. The one that has been admitted in evidence.

The Court. You are talking about AO?

Mr. Castro. Yes, your Honor.

The Court. Was it delinquent at the time of the fire?

Mr. Castro. Yes, that is what I am asking.

Mr. Hilger. I object to it.

The Court. Sustained. You mean by that, I take it, whether or not there were payments due the finance company that had not been paid. I will sustain the objection if that is the question. (523).

Q. (By Mr. Castro). Had you received any checks from Hyrum M. Jensen covering any installments due prior to June 25, 1956?

Mr. Hilger. Same objection.

Mr. Castro. (Continuing) Which had not been honored by the bank when they were presented?

Mr. Hilger. Same objection.

The Court. Same ruling. Sustained.

Q. (By Mr. Castro). As of June 25, 1956, were you holding any checks of Hyrum M. Jensen?

Mr. Hilger. Same objection, your Honor.

The Court. Same ruling.

Mr. Hilger. I am going to suggest that further questioning along this line would be misconduct of counsel.

The Court. It is prejudicial, I think. I will sustain the objection. I have already ruled, in the absence of the jury, that those questions are immaterial in the present state of the record.

Mr. Castro. Those are all the questions I have at this time, your Honor. At the close of the session this afternoon may I make an offer of proof concerning these matters I have been asking about?

The Court. Very well, I think the questions indicate the nature of the proof you are seeking to bring in, but you may make it formally if you wish." (524).

Richard Hanna would have testified the account was delinquent at the time of the fire; after the fire Appellee voluntarily transferred the Dayton Murray Truck Sales truck to H. D. Jensen, who transferred it to Robert Halverson (522, 523, Ex. "AP", *Iden.*).

D. *In direct examination of C.P.A. Russell M. Stearns*, who reviewed the bank statements of the Company for Appellant, Appellant urged the following questions were admissible to show financial condition relating to motive, but the Court sustained objections to the questions.

1. *Overdrafts.*

"Q. In reviewing the records of the Eureka Lumber Company did you look for the fact as to whether or not there were any overdrafts?

A. I did.

Mr. Hilger. I will object to that.

The Court. Sustained. (560-561).

Mr. Castro. The following questions, your Honor, go to that question of financial responsibility, so I would have to make an offer of proof because I understand what your Honor's rulings are.

The Court. I take it you want the witness to testify as to what he found to be the financial condition of the plaintiff?

Mr. Castro. That is correct.

The Court. I assume they cover that field. I will sustain an objection to it." (561).

Russell M. Stearns would have established the dates and amounts of the overdrafts; attachments of the bank account; the relation between the respective bank accounts of Appellee and H. D. Jensen; the borrowing of money to satisfy the attachments and overdrafts; from April 20, 1956, through the fire, the balance in H. D. Jensen's account was less than \$100.00; Appellee and H. D. Jensen were unable to meet their current obligations.

2. *Financial Statement of June 14, 1956, Ex. 18, was false:*

"Q. (By Mr. Castro). With reference to Plaintiff's Exhibit 18, a financial statement given to the Anglo California Bank on June 14th, 1956, have you reviewed that financial statement?

A. Yes.

Q. Have you reviewed that financial statement with specific reference to accounts payable?

A. Yes.

Q. Does that exhibit correctly state the accounts payable as of the date in June?

Mr. Hilger. I will object to that. It calls for a conclusion based upon an examination I do not think it was possible for him to make. He has already indicated that he has not had access or the records of 1956 in June have not been available to him for his examination. He has had no

information as to the manner of record keeping, whether it is cash, accrual, or what inventory items were considered transit and what were not. I think all he can tell us is what accounts payable he might (561) have ascertained actually existed, but as to the correctness of the documents, I think it would call for a conclusion on which he could not possibly have the basis for a valid opinion, even in view of his own testimony that he has been unable to examine the records.

The Court. I am going to curtail the examination as to financial standing. I see no relevancy of it in this case.

Mr. Castro. Again there would be an offer of proof.

The Court. Otherwise we would go into a long examination here that might take a long time as to the correctness of the financial statements that the plaintiff made to the bank. We have no concern with that here.

Mr. Castro. That is in evidence on behalf of of the plaintiff over our objection, your Honor, and it goes for the truth of the fact.

The Court. It came in connection with some testimony, not to show financial standing, but, as I recall—this record has not been written up?

Mr. Castro. No, it has not, your Honor. It came in for all purposes. I did not hear any limitation at the time.

Mr. Hilger. It came in because of the issues raised by counsel in his opening statement, which he has been unable to meet so far on the basis of the evidence.

The Court. If that is the case then I will enter- (561) tain a motion to strike out the financial statements from the record.

Mr. Hilger. Then we will move to strike it out. It was not a statement rendered to the insurance carrier and they have nothing to do with its correctness one way or the other. It goes to an issue that was raised by counsel in its opening statement but which has not developed in the trial of the matter, and therefore it would be irrelevant.

The Court. The Court admitted them on behalf of the plaintiff.

Mr. Castro. I did not offer them in evidence.

The Court. I say the Court admitted them on behalf of the plaintiff.

Mr. Castro. That is correct.

The Court. In view of the fact that you had made an opening statement in which you had made certain statements, and I ruled, although it was strictly in the sense of rebuttal, I would allow them in as statements on the theory that the Court had control over the order of proof. Since there has been no foundation laid to consider the question of financial condition, on the motion of either side, I would strike the financial statements from the record.

Mr. Hilger. In the present state of the record it relates to no issue raised here and I would move to strike it out since we offered it.

The Court. Both financial statements may be stricken, 17 and 18. (563).

(Thereupon Plaintiff's Exhibits 17 and 18 were withdrawn from evidence)" (564).⁴

Russell M. Stearns would have testified from the information he had at hand of creditors of Eureka

⁴Later, Ex. 18 placed in evidence as Ex. "AY" for limited purpose to show as of June 1, 1956, inventory only \$28,080 (571).

Lumber Company; Appellee's liabilities were \$169,748.40 (not \$95,679.00); accounts receivable were only \$2,998.32 (not \$29,404.08).

E. *Appellant urged the testimony of A. J. Franceschi, in his deposition was admissible to show motive and falsification, but the Court sustained the following objection to it.*

"Mr. Castro. At this time I will offer in evidence the deposition of Angelo Franceschi, manager of the Crocker-Anglo Bank of Eureka, taken on September 18, 1957.

Mr. Hilger. There are two depositions, one of September 7th and one of September 18th.

The Court. Which one do you offer?

Mr. Castro. The one of September 18th.

Mr. Hilger. I will make the same objection to this deposition that I made to the previous one, your Honor.

The Court. This concerns financial transactions with the bank?

Mr. Hilger. That is all.

The Court. Nothing else is involved? I will sustain the objection on the same ground. The deposition may be marked for identification.

(The deposition referred to was thereupon marked Defendant's Exhibit AS for identification.)" (536)

A. J. Franceschi would have testified that on the purchase of the dwelling from G. R. Abrahamson, Appellee borrowed \$14,000 from the Bank of America, National Trust & Savings Association, which was evidenced by a note and secured by a Deed of Trust;

that on March 1, 1956, Crocker-Anglo Bank loaned Appellee \$5,000.00, and on June 18, 1956, another \$5,000.00 which were payable July 31, 1956; that personal property taxes for the fiscal year 1955-56 to the City of Eureka and County of Mendocino were delinquent at the time of the fire; that a list was prepared of the attachments which were made on the accounts of Appellees; the attachments were January 5, 1956, \$2,472; February 10, 1956, \$530.00; June 22, 1956, \$2,255.04; that the H. D. Jensen account was opened November 22, 1955, with a deposit of \$300.00, and was closed November 25, 1955, and was reopened on December 5, 1955, with a deposit of \$350.00 (Ex. AS Identif.).

F. *Appellant urged the testimony of G. R. Abrahamson* was admissible to show motive and falsification, but the Court sustained the following objection to it.

“Mr. Castro. At this time I would offer in evidence the deposition of G. R. Abrahamson taken on September 18, 1957.

Mr. Hilger. I will object to this on the ground it is incompetent, irrelevant and immaterial in all respects. It addresses itself to an indebtedness that this gentleman had on the purchase of a home, which indebtedness was subsequently paid.

The Court. I will sustain the objection made by counsel on the same grounds heretofore stated by the Court, and you may mark the deposition for identification if you wish.

(The deposition referred to was thereupon marked Defendant's Exhibit AR for identification.)” (535-6)

G. R. Abrahamson would have testified that he sold a dwelling to Appellee for the sum of \$37,500 and he received a check for \$2,500.00 and a note for \$18,624.58 secured by a second deed of trust, which second deed of trust note was payable \$5,000 on February 1, 1956, which payment was made, leaving a balance of \$13,624.58 due on May 2, 1956, that Appellee was in default and that he notified Appellee that he was in default. On June 18, 1956, he received \$5,000, leaving an unpaid balance in default of \$8,624.58, as of the time of the fire (Ex. AR Iden.).

G. *Allowing testimony of A. J. Franceschi—Re: Credit Standing.*

In the direct examination of Witness A. J. Franceschi in his deposition, over the following objection of Appellant, the Court permitted the witness to testify the credit standing of the Company was good. At the trial the following occurred:

“Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?

Mr. Castro. Objection to that, your Honor, on which we stand.

The Court. I will overrule the objection.

A. As far as we were concerned, it was good.”

(71)

The following appears in the deposition and was read silently by the Court:⁵

⁵The quotation appeared in the deposition and was read silently by the Court. Appellant requests that the record be supplemented to include such objection.

“Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?

Mr. Castro. Objected to as irrelevant, incompetent and immaterial, no bearing upon any issue in this case.” (Dep. p. 5).

III. IN ALLOWING APPELLEE TO TESTIFY, ON DIRECT EXAMINATION, THAT HE HAD INFORMATION CONCERNING TWO MEN BEING SEEN, WHICH APPELLEE GAVE TO THE FIRE DEPARTMENT (114).

Appellant objected on the grounds of hearsay as follows:

“A. Yes. Mr. McBeth, one of the firemen, was there and he asked me how I thought it caught fire, and I told him I didn’t know. I said, ‘I think somebody set it afire.’ I said, ‘We had better get an investigator.’ I told him and the fire chief. In the meantime we walked outside. Mr. Moser—he is a truck dispatcher that is on the opposite corner—two fellows, truck drivers, told him that they had seen two men——

Mr. Castro. Just a moment (114).

The Court. This will be hearsay, I’m afraid, counsel.

Mr. Hilger. I’m afraid that would be, your Honor. I want to establish this fact:

Q. Did you receive information concerning anyone being seen around the place?

A. Yes, I did.

Mr. Castro. I object to that as hearsay.

Mr. Hilger. I just want to find out if he received that information.

Mr. Castro. I object to that as hearsay. What information he may or may not have received in the absence of the defendant, your Honor, I believe is hearsay.

The Court. As long as he does not say what it was, he may use that fact as a preliminary to something that he did. I can't tell.

Mr. Hilger. Precisely, your Honor.

The Court. The witness is not to testify to what he heard, but he did receive some information and that much I will allow.

Q. (By Mr. Hilger). You received some information concerning someone seen at the fire, and thereupon what did you do?

A. Yes, I did.

Mr. Castro. Just a moment. Your Honor, I object to that as calling for hearsay.

The Court. I will rule on it after I hear his answer to the next question.

Q. (By Mr. Hilger). What did you do with the information so received?

A. I called Mr. McBeth, the fireman, and the (115) chief of the fireman, and a couple of police officers and told them.

The Court. All right. You gave the information that you received to some police officers.

The Witness. Yes, I did, and the fireman, Mr. McBeth, and I told him——

The Court. You can't say what you told them.

Mr. Hilger. Without saying what you said——

The Witness. I will keep still.

Mr. Hilger. You passed on the information you received.

The Witness. Okay.

The Court. I will allow the answer to stand for the purpose stated. The witness received

some information and passed it on to the police officers." (116).

IV. IN LIMITING APPELLANT'S CROSS-EXAMINATION OF APPELLEE, ON WHETHER APPELLEE KNOWINGLY, OR AS AN OVERT ACT OF THE CONSPIRACY, CAUSED H. D. JENSEN NOT TO SUBMIT TO THE EXAMINATION UNDER OATH REQUESTED BY THE LETTER OF OCTOBER 8, 1956, ON OCTOBER 12, 1956 (Ex. H, 210-211).

The Court sustained the following objections:

"Q. (By Mr. Castro). Did Harold Dee Jensen appear for the examination under oath?

A. Yes.

Q. Did Harold Dee Jensen appear for the examination under oath on October 12, 1956?

A. I don't think he did at that time.

Q. Did he appear at the office on that day?

A. No, not that I know of.

Q. Did he appear on any other occasion prior to (210) the time you filed the lawsuit for examination under oath?

Mr. Hilger. I will object. This is totally immaterial. There is no showing that it was the duty of Harold Dee Jensen to appear any place at the request of the insurance carrier. He was not the insured under the policy.

The Court. I will sustain the objection.

Q. (By Mr. Castro). Did you see Harold Dee Jensen on the morning of the examination under oath?

A. Under my examination——

Mr. Hilger. Objection.

The Court. Same ruling.

Mr. Castro. I would like to lay a foundation, your Honor. That is what I am trying to do.

The Court. What difference does it make whether he saw him or did not see him? What has that got to do with it?

Mr. Castro. There are cases that hold, your Honor, that you were entitled to examine the employee under oath on these losses.

The Court. What has that got to do with the examination of this witness? If you want to make a point of it all you have to do is to show you requested the examination but he did not appear. I do not see how that is material in the examination of this witness.

Mr. Castro. I want to show this witness sent him out of town that morning.

The Witness. That is a lie. (211)

Mr. Hilger. Does that answer the question, counsel?

Mr. Castro. I move to strike that out as not responsive.

The Court. I don't know. You brought it on yourself, counsel. You made a statement as an officer of the Court that this witness did something that is not only unconscionable but perhaps unlawful, and he has a right to respond to that. I will allow the answer to stand.

Mr. Castro. May I cross examine him?

The Court. I will hold that this type of examination at this point immaterial.

Mr. Castro. Then may I ask that the answer be stricken from the record, since I am deprived of cross examination?

The Court. No. I will allow the answer to stand for the reason I have stated. I am not going

to elaborate on it. I have already stated the reason for the Court's ruling.

Q. (By Mr. Castro). On the morning of the examination under oath did you furnish Dee Jensen your car to leave the City of Eureka?

Mr. Hilger. I will object to that as totally immaterial.

The Witness. I can answer. No.

The Court. I will sustain the objection.

Q. (By Mr. Castro). On the morning of the examination under oath, did you know that Dee Jensen was requested to appear for that examination under oath? (212)

Mr. Hilger. I object to that as immaterial.

The Court. Sustained.

Q. (By Mr. Castro). On the morning of the examination under oath you sent Dee Jensen out of the City of Eureka, didn't you?

Mr. Hilger. I will object to that and cite it as misconduct of counsel, in addition to being immaterial.

The Court. I will sustain the objection, and if counsel persists in this examination I will take further measures. You have already asked that question and he answered it in quite emphatic terms, and I do not think there is need to repeat it." (213).

Appellant would have shown that for more than one year prior to October 12, 1956, H. D. Jensen was making his home with Appellee in Eureka; on the morning of the scheduled Examination Under Oath Appellee sent H. D. Jensen out of Eureka, then Appellee appeared to be examined, but H. D. Jensen did not

appear, and both Appellee and H. D. Jensen, respectively knew he was to appear prior to the commencement of the subject action (213-220).

V. IN LIMITING APPELLANT'S CROSS-EXAMINATION OF APPELLEE AS TO WHETHER THE CLOSING INVENTORY FOR THE CALENDAR YEAR 1955 EXCEEDED \$15,478.11 (202).

The following objection by Appellee was sustained by the Court:

"Mr. Hilger. To what date are we now referring?

Mr. Castro. Referring to Exhibit 18, which was the proof of loss on June 1, 1956, containing a statement fixing an inventory of \$15,478.11.

Mr. Hilger. I doubt if any proof of loss was filed on the date given, counsel.

Mr. Castro. I am not talking about a proof of loss (202).

Mr. Hilger. You stated proof of loss. You may not have meant it.

Mr. Castro. Profit and loss statement.

Mr. Hilger. I am going to object to that as being too remote from the date of June 5, 1956, as to what might or might not have been in there. We have gone back to December 31, 1955, which is six and a half months prior to the fire, and what inventory was there on that date has absolutely no connection.

The Court. Is that what you are reading from, a profit and loss statement for 1955?

Mr. Castro. June 1, 1956, to which is attached a profit and loss statement dated December 31, 1955.

The Court. Then it is a profit and loss statement for 1955 that you are referring to.

Mr. Castro. No, I am referring to a profit and loss statement which is Exhibit 18, which was under date of June 1, 1956, and attached to it on the inside is a profit and loss statement reflecting the inventory as of the close of business in 1955.

“Mr. Hilger. And the specific question has to do with the inventory of December 31, 1955, which I submit is too remote in time to have anything to do with the existence or non-existence of an inventory on June 25, 1956.

The Court. I think the objection is good . . .” (203).

An answer to such question was material to a showing that the inventory on June 1, 1956, was only \$28,080 (Ex. 18, AY); and there was no record of any substantial purchases or deliveries received after June 1, 1956, to the time of the fire, when the inventory would not have exceeded \$28,080 as contrasted with the prior claim of \$63,549.54 (Witness Russell M. Stearns).

VI. IN ALLOWING WITNESS DAYTON MURRAY, JR., ON DIRECT EXAMINATION BY APPELLEE, TO TESTIFY:

A. *As to discussions between H. D. Jensen and W. A. Threlkeld.* From discussions with H. D. Jensen and W. A. Threlkeld, the then owner of Dayton Murray Truck Sales, that on January 1, 1956, Threlkeld agreed to accept and allow \$7,500 for said portable sawmill as a trade in for a used truck and trailer

(336). Appellant objected on the grounds of hearsay, as follows:

“Q. Do you have any personal knowledge of the transaction at all, have you ever discussed it with the officials of the company?

A. I have no direct knowledge of the transaction. I have knowledge of it from discussions with Mr. Harold Dee Jensen and with Mr. Threlkeld who was the previous Manager of Dayton Murray Truck Sales.

Q. And those discussions concerning this transaction were in the course of conduct of business of Dayton Murray Truck Sales?

A. Yes, that's correct.

Q. Now just what was that transaction, Mr. Murray?”

“Mr. Castro. The following objection, Your Honor, we would ask for the Court to rule on.

The following appears in the deposition and was read silently by the Court:

‘Mr. Castro. (Inter’g). Object to the question on the grounds the witness has stated he has no personal knowledge on the subject matter. He has testified he has possession of two documents, and any other information he has is purely hearsay (336).

Mr. Hilger. As a result of the discussions that you have had in the course of the conduct of business of Dayton Murray Truck Sales, state your knowledge of this situation.

Mr. Castro. Object to it as incompetent, irrelevant and immaterial, calling for hearsay. The witness has testified he has no personal knowledge of the transaction.

Mr. Hilger. Please answer the question.

The Witness. From the examination of the records of the Dayton Murray Truck Sales——

Mr. Castro. (Int'g). The question didn't call for an examination of the records of Dayton Murray Truck Sales, it called for your knowledge based upon your discussions had in the course and conduct of business of Dayton Murray Truck Sales.

The Witness. My knowledge based on my discussions of the——

Mr. Castro. (Int'g). Same objection to it, same objection that has been previously made, hearsay and the witness has stated he has no personal knowledge of the transaction.

The Witness. May I answer the question, Counsel?

Mr. Hilger. Yes.'

The Court. I will overrule the objection.

Mr. Hilger. Thank you, your Honor. I believe the question is finally answered on page 9. May I begin the reading there:

'A. My discussions with Mr. Harold Dee Jensen (337) and with Mr. Threlkeld who was the then Manager of the Dayton Murray Truck Sales at the time of this transaction and from the documents of Dayton Murray Truck Sales, Dayton Murray Truck Sales sold a nine seventy-four series Diesel truck to the Eureka Lumber Company on January 1, 1956, at least that's the date of the invoice. As a down payment to Dayton Murray Truck Sales they took a two seventy-five Cummings Diesel engine in a portable sawmill and credited four thousand dollars on the purchase price of the truck and agreed with Eureka Lumber Company to give them an additional thirty

five hundred dollar credit upon the sale of this resale by Dayton Murray Truck Sales of this sawmill unit or upon a certain date which is set forth in the invoice, whichever first occurred. I believe it was approximately six months after the date of the transaction.

Mr. Hilger. Now you have testified that in your official capacity you have custody of the records and documents of the Dayton Murray Truck Sales?

A. That's correct.' '' (338).

B. *As to the meaning of a figure of \$4,000.00 on an alleged carbon copy of the invoice covering the "trade in" on the used truck and trailer (340), Appellant objected as follows:*

" 'Q. What does that figure, that four thousand dollar figure represent?'

Mr. Castro. I stand on the objection made at that time.

The following appears in the deposition and was read silently by the Court:

'Mr. Castro. I object on the grounds it's irrelevant, incompetent and immaterial. The witness has already testified and my examination shows that he has no personal knowledge concerning this transaction, and the document is the best evidence of what it states, and the original of the document would constitute the best evidence.'

The Court. It is taking an awful long time to prove a simple transaction, the purchase of a truck. I will overrule the objection.

Mr. Hilger. I think we can skip all the voir dire, then, and get down to the answer to the question, which begins on page 16, line 2:

‘A. The four thousand dollar figure reflects a (340) credit on the purchase price given to Eureka Lumber Company by Dayton Murray Truck Sales on the trade-in of this portable sawmill described in the document.

Q. Now in the ordinary course of conduct of Dayton Murray Truck Sales business where is the original invoice sent?

A. The original invoice would have undoubtedly been sent to the purchaser.

Q. Is the original of that invoice that you have there marked Defendant’s A for identification, is the original of that document in the records of the Dayton Murray Truck Sales?

A. No, it is not.’ ” (340-341).

C. *As to whether there was a \$3,500.00 credit in addition to said \$4,000.00 (342), Appellant objected as follows:*

“Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollars item that you previously testified concerning?”

“Mr. Castro. I stand on that objection.

The following appears in the deposition and was read silently by the Court:

Mr. Castro. Objected to as incompetent, irrelevant, and immaterial, no identification as to who made that notation that you are referring to. It’s not part of the original document, that’s obvious.

The Witness. YMAC is Yellow Manufacturing Acceptance Corporation which is the finance corporation for General Motors truck dealers.

They finance the sales of equipment. Contracts are assigned to YMAC by the dealer making the contract. The (342) significance of the notation here is that that represents the——

Mr. Castro (Int'g). Just a moment. He asked you what the initials stood for.

Mr. Hilger. I'll at this time ask you the significance of the notation.

Mr. Castro. Objected to as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and not for a fact.

Mr. Hilger. Would you answer that?

The Witness. The significance of the statement on the invoice is the thirty-five hundred dollars listed is additional credit due YMAC, represents the balance of the credit on the purchase price that was given for the trade-in of the portable sawmill.

Q. That would be the purchase price paid by Dayton Murray Truck Sales for the portable sawmill?

A. That's correct.

Q. To Eureka Lumber Company?

A. That's correct.

Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollar item that you previously testified concerning?

Mr. Castro. Same objection.

The Witness. That's correct.

Mr. Castro. Same objection to this line of questions, Counsel, he has no personal knowledge of the transaction."

"The Court. Overruled.

Mr. Hilger. Then your answer is yes?

The Witness. My answer is yes." (342-344).

VII. IN ADMITTING IN EVIDENCE THE ALLEGED CARBON COPY OF SAID "TRADE IN" INVOICE AS EX. 20 (344-345).

Appellant objected to the document as follows:

"Mr. Hilger. At this time I will offer both the bill of sale and the invoice into evidence as Plaintiff's next in order.

The Court. There are documents that are attached here.

Mr. Hilger. Yes, Your Honor.

Mr. Castro. I object to the invoice on the ground it is not the best evidence of the transaction, Your Honor.

The Court. You are making an objection to the document?

Mr. Castro. Yes, the copy which was used of the invoice.

The Court. I will overrule the objection. You want them marked one exhibit?

Mr. Hilger. They may be marked as one exhibit. (The bill of sale and the invoice were thereupon received in evidence and marked Plaintiff's Exhibit 20.)" (344-5).

VIII. REFUSAL TO ADMIT IN EVIDENCE WRITTEN AGREEMENT WHEREBY H. D. JENSEN RELEASED HIS INTEREST IN THE SAWMILL ON HANSON ROAD.

During the cross-examination of Appellee, Appellant offered in evidence a written agreement between Appellee, H. D. Jensen and others, whereby the Eureka Lumber Company was taken in Appellee's name, to which the trial Court sustained Appellee's objections:

"Mr. Hilger. I object to this as incompetent, irrelevant and immaterial to any issue in this

case. It does not show who was acquiring, who was transferring. It is nothing in the world but a mutual release.

Mr. Castro. I offer the document.

Mr. Hilger. I have no objection to the authenticity of the document, Your Honor. It is just that it is immaterial and incompetent to prove anything that is in issue in this case.

The Court. It seems to have been drawn up by attorneys, but I have some difficulty in understanding it.

Mr. Hilger. It was not our office, Your Honor.

The Court. Apparently it was a 1953 transaction. I will sustain the objection on the ground it is too remote to this controversy. I think we have enough to do to try the problem of the claim here in 1956.

Mr. Castro. May we have it marked for identification?

The Court. Certainly.

(The document referred to was thereupon marked Defendant's Exhibit J for identification.)" (229).

This document was material as to H. D. Jensen's interest in the insured policy.

IX. IN INSTRUCTING THE JURY THAT APPELLANT WAS REQUIRED TO PROVE THAT APPELLEE "WILFULLY" FAILED TO PRODUCE RECORDS, OTHERWISE THE FAILURE TO PRODUCE WAS NOT A DEFENSE.

Such instruction read:

"The defendant claims that the plaintiff has not complied with the policy of insurance by not producing all records which the defendant demanded,

and thereby has debarred himself from recovery in this action. Whether or not the plaintiff has so complied with the policy is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence. If you find that the plaintiff substantially and willfully failed to produce material records within his power to produce, then you may find for the defendant; otherwise not. Stated somewhat differently and on the other side, as it were, you should not find in favor of the defendant on this issue unless you are convinced by a preponderance of evidence that the plaintiff willfully failed to produce records which were material to his claim of loss and within his power to produce. The defendant has the burden of proving such failure on the part of the plaintiff. I mean by that the defendant has the burden of proving that the plaintiff has substantially and willfully failed to produce records within his power to produce.” (Emphasis added.)

Appellant objected to the question upon the ground that Appellant was not required to prove it was a “wilful failure”, but Appellee was required to prove performance of such condition (594-595).

X. IN FAILING TO INSTRUCT THE JURY AS TO THE FRAUD OR CONCEALMENT PROVISIONS OF THE POLICY (Proposed Instruction Nos. 8, 18, 19, 21).

Appellant’s proposed Instruction No. 8 read (26):

“Policy Void for Concealment or Fraud

The California standard fire policy provides:

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed

or misrepresented any material fact or circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

Appellant’s Proposed Instruction No. 18 read (30) :

“Concealment—Definition

Neglect to communicate that which an insured knows and ought to communicate to an insurer is concealment.

See: Insurance Code 330.”

Appellant’s Proposed Instruction No. 19 read (30) :

“Concealment—Intent

A concealment of fact, whether intentional or unintentional, which is material to the risk voids the policy. The presence of an attempt to deceive is not required to void the policy.

Gates v. General Casualty Co. of America (1941 9th Cir.) 120 Fed 2d 925, 927; Hogel & Co. v. U. S. Fidelity & Guarantee Co. (1939) 35 C. A. 2d 171, 181; 94 P 2d 1046.”

Appellant’s Proposed Instruction No. 21 read (31) :

“Concealment—Materiality

Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contracts for making his inquiries.

Insurance Code 334.”

Appellant objected to the failure to instruct on such subjects by calling the omission to the Court's attention as follows (596):

"The Court. Do I understand, so your record may be complete, you are excepting for failure to give those instructions?

Mr. Castro. That I am now noting.

The Court. Because, you see, I will file your proposed instructions so that your reference to them by number would be identifiable" (596)

"Instruction number eight, relating to concealment and fraud as defined by the policy." (597)

"Instruction number eighteen, defining what is meant by the term 'Concealment'.

Instruction number nineteen dealing with the elements of intent and concealment.

Instruction number twenty-one, dealing with the elements of materiality and the concealment . . ." (597)

"The Court. Very well. All the exceptions will be noted. Will you bring the jury back and I will instruct them about the welder."

XI. IN FAILING TO INSTRUCT THE JURY AS TO THE DEFENSES OF FRAUD OR CONCEALMENT RELATING TO APPELLEE'S KNOWLEDGE OF FIRE'S ORIGIN (Proposed Instruction No. 24).

Appellant's Proposed Instruction No. 24 read (32):

"Burden of Proving Concealment, Fraud or Arson.

While the burden of proving concealment, misrepresentation or fraud on the part of the plaintiff to void such policy is upon the defendant, the

law does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible, as concealment, misrepresentation, or fraud are usually planned and executed with stealth and secrecy. In a civil action it is proper to find that defendant has succeeded in carrying its burden of proof on the issue of concealment, misrepresentation or fraud if the evidence favoring their side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that on that issue the probability of truth favors the defendant.

Concealment, misrepresentation or fraud as to the origin of a fire is provable by circumstantial evidence, that is, by inference reasonably deducible from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing such a concealment, misrepresentation or fraud by direct evidence, as a person who sets a fire to a building usually plans and executes his plan with stealth and secrecy. Consequently all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by you in determining whether plaintiff has wilfully concealed, misrepresented or committed any fraud concerning this fire."

Appellant objected to the failure to instruct on such subjects by calling the omissions to the Court's attention at the close of the instructions (597):

" . . . Instruction number twenty-four, relating to the use of circumstantial evidence in fraud,

misrepresentation and the concealment. I believe that covers each of the matters that I have in mind, your Honor . . .” (597)

A. Failure to instruct jury as to whether fraud of employee imputable to employer.

Later, during its deliberations, the jury requested the Court . . . “further instructions on the term ‘Fraud’ in relation to employer and employee.”; and the jury amplified such request by the following statement (598-600):

“Is employer responsible for possible misstatements or fraud of an employee on his statement or document if the employer signs the document?” (600)

The Court replied to the jury that, the interrogatory related to an abstract question of law and he was unable to answer it. No further objection was made to the Court’s refusal to instruct on the subject of fraud, because the Court did not give Counsel an opportunity to object (600-601):

“The Court. Members of the jury, with respect to the inquiry which you have made, ‘Is employer responsible for possible misstatement or fraud of employee on a statement or document if the employer signs the document,’ I must say to you that I am unable to answer that question. That is an abstract question of law and it could not be answered by any Judge in my opinion without reference to the particular facts and circumstances. I do not know what the jury has in mind with respect to the matter, and I will go no further than to say that the Court is

unable to give you any advice on an abstract principle of law, because there may be a dozen cases in which there might be responsibility and there might be another dozen cases in which there might not be responsibility. Each case would stand or fall on its own, and I am not in a position to give you an instruction on some abstract principal of law such as that. You will have to work out your conclusion on the basis of the instructions which I have heretofore given you.”

XII. IN FAILING TO INSTRUCT THE JURY AS TO APPELLEE'S DUTY TO COMPLY WITH THE POLICY REQUIREMENTS AND APPELLANT'S RIGHT TO EXAMINATION UNDER OATH (Proposed Instructions Nos. 3, 5 and 4).

Appellant's proposed instruction No. 3 read (24):

“Compliance With Conditions Precedent Required

The standard California fire insurance policy provides that:

‘No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, * * *’

In its answer, defendant has set forth that plaintiff did not comply with the following requirements of the standard California fire insurance policy in that such policy provides as follows:

‘The insured, as often as may be reasonably required shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this com-

pany, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.'

When an insured has failed to comply with the requirements of the policy which require him to produce said bills, invoices and other vouchers, or copies thereof if the originals be lost or fail to submit to an examination under oath, the failure either to produce such documents or submit to such Examination Under Oath constitutes a complete defense to any action on the policy. . . . Authorities cited. . . .''

Appellant's proposed instruction No. 5 read (26):

"Meaning of 'Shall'

As used in the Insurance Code of the State of California, and in the parts of the policy that are hereafter read to you in my instructions, the word 'shall' is mandatory unless otherwise apparent from the context. . . . Authorities cited. . . .''

Appellant's proposed instruction No. 4 read (25-26):

"Burden of Proof

An insurer is not liable except upon proof that the loss has occurred within the terms of the policy and the burden of proof is upon the insured to prove that he has performed the conditions of the policy. . . . Authorities cited. . . .''

The following objection to the failure to instruct on such subjects was made (596):

of the fire, the failure to produce books and records, the incendiary fire and the conspiracy to defraud Appellant by setting the fire and filing and swearing to a false proof of loss.

While there is real evidence as to what was used to cause the fire and its rapid spread, there is no direct evidence showing the exact method by which the fire was started, but these circumstances show the fire was of incendiary origin: it originated at floor level inside a locked building in a stock storage room, where the floor showed evidence of inflammable fluid having been applied to the floor; and the firemen found an open container with an odor of diesel fluid there, as well as a gasoline drum with a pump loosely affixed, permitting fumes to escape. This storage room was not normally used to store either diesel or gasoline. Also, containers and a rag were found in lumber debris, where they would not ordinarily be placed. H. D. Jensen was alone in the building approximately 10-12 minutes before the fire was discovered; and he was observed fleeing from the building after the fire originated and before the alarm sounded at 12:21 P.M.

A false Proof of Loss was executed by Appellee claiming he had no knowledge of the origin of the fire and grossly exaggerating inventory and the "out of sight" loss. Employees familiar with the storage area contradicted Appellee.

Appellee and H. D. Jensen had a financial motive to conspire to defraud Appellant. The Court excluded evidence offered to show financial motive such as

creditors pressing for payments on delinquent accounts, dishonored checks, and the general inability to meet current obligations of the business.

The conspiracy to defraud Appellant by setting said fire and filing said Proof of Loss was shown by the relationships of Appellee and H. D. Jensen, the acts done by them, the circumstances surrounding the fire, the Proof of Loss, and the failure to produce invoices or submit H. D. Jensen to an Examination Under Oath.

Appellee breached conditions of the policy when he declined to produce books, invoices, or copies thereof, and to submit H. D. Jensen to an Examination Under Oath. Proper written requests were made for the production of such books, invoices and the examination of H. D. Jensen, but the requests were not met.

Appellant's Motions for a directed verdict and Judgment N.O.V. on the ground that Appellee had not complied with the policy conditions should have been granted, because the burden was upon Appellee to prove that he complied with the conditions of the policy, which he did not do.

Appellant's motion, in the alternative, for a new trial should have been granted because of the substantial evidence showing the origin of the fire was incendiary and connecting H. D. Jensen and Appellee to such origin, the erroneous rulings on the admission of evidence relating to motive, hearsay testimony and secondary evidence, compliance with the requirements of the policy, the erroneous instructions on the burden of proof on Appellant and the refusal to instruct

the Jury on the issues of fraud, concealment, incendiary fire, conspiracy and the requirements of the policy.

ARGUMENT.

I. CALIFORNIA RULE OF LAW APPLICABLE.

In diversity of citizenship cases involving an insurance policy, questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of rights and obligations under a policy are matters of substantive law in which it is the duty of the trial Court to apply the State rule,

Erie Railroad Co. v. Tompkins (1938), 304

U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Palmer v. Hoffman (1943), 318 U.S. 109, 63

S. Ct. 477, 87 L. Ed. 645;

Van Meter v. Franklin Fire Ins. Co. (1947 Cr.

9), 164 F. (2d) 325;

Hyland v. Miller Nat. Ins. Co. (1947 Cr. 9),

91 F. 2d 735, 737.

A. California Rule on Motions for Directed Verdict and Judgment *Non Obstante Veredicto*.

Since taking the issues of fraud, concealment, conspiracy to defraud by a false proof of loss or an incendiary fire from the Jury was, in effect, a directed verdict on such issues for Appellee and third party defendant H. D. Jensen, (See: *Umsted v. Scofield Eng. Const. Co.* (1928), 203 Cal. 224, 226, 263 P. 799) the following principles recognized by California in determining whether motions for directed verdict are applicable:

(a) “Unless it can be said that, as a matter of law, no other reasonable conclusion was legally deductible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or a trial court to set it aside, it must be held that the court erred in taking the case from the jury and itself rendering the decision.” (p. 228.)

Umsted v. Scofield Eng. Const. Co. (1928), 203 Cal. 224, 226, 228, 263 Pac. 799.

(b) In *Singleton v. Hartford Fire Ins. Co.* (1930), 105 Cal.App. 320, 326, 287 P. 529, the Court stated:

“The foregoing state of the record conclusively indicates that the issues as to the cause of the fire and respecting the alleged fraudulent misrepresentation as to the personal property which was claimed to have been destroyed by fire, should have been submitted to the jury. The liability of the insurance company depended upon the solution of these questions.

A direction to the jury to render a verdict on a question of fact, where there is substantial evidence to justify a contrary decision thereon, is an invasion of the province of the jury and in conflict with the constitutional inhibition against a trial judge charging the jury on matters of fact. (24 Cal. Jur. 916, sec. 164; *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224 (263 P. 799).) Upon a motion for a directed verdict every reasonable inference made from the evidence should be resolved in favor of the party against whom the application is made. When reasonable minds may differ as to the effect of the evidence upon

the solution of an issue of fact, the application to direct a verdict should be denied. (*Boyle v. Coast Imp. Co.*, 27 Cal. App. 714 (151 P. 25); *Robertson v. Weingart*, 91 Cal. App. 715, 726 (267 Pac. 741); 33 C.J. 130, sec. 863.) From time immemorial the courts have jealously guarded the rights of juries to pass upon facts. An application to direct a verdict upon facts should be granted with caution and only when it is clear there is no substantial evidence to support a contrary finding. In the present case it may not reasonably be said there is no substantial evidence to support the appellant's contentions that (1) the fire was of incendiary origin and, (2) false statements of the property alleged to have been lost were wilfully made. These were questions for the jury to determine. This evidence was material.

Under the provisions of the policy in the present case, wilful destruction of the property on the part of the insured, or wilful and false statements made by him on his proof of loss with intent to defraud the insurance company, will totally avoid the policy and relieve the insurer from all liability thereunder. (*Pedrotti v. American Nat. Fire Ins. Co.*, 90 Cal. App. 668 (266 Pac. 376); 33 C.J. 19, sec. 667; 6 *Cooley's Briefs on Insurance*, p. 4938; 7 *Cooley's Briefs on Insurance*, p. 5858.)

The judgment is reversed." (P. 326.)

B. Fraud, Conspiracy to Defraud by an Incendiary Fire or False Proof Are Provable by Circumstantial Evidence.

In a civil action, a conspiracy, fraud or an incendiary fire is each provable by circumstantial evidence:

(1) Incendiary fire:

People v. Hays (1950), 101 C.A.2d 305, 311,
225 P.2d 600;

People v. Freeman (1955), 135 C.A.2d 11, 15,
286 P.2d 565;

People v. Kessler (1944), 62 C.A.2d 817, 823,
145 P.2d 656.

(2) Conspiracy to defraud:

Johnstone v. Morris (1930), 210 Cal. 580, 590,
292 P. 970;

Dandim v. Dandim (1953), 120 C.A.2d 211, 214,
260 P.2d 1033.

(3) Fraud:

Newman v. Fireman's Ins. Co. (1944), 67 C.A.
2d 386, 399, 154 P.2d 451;

Bohn v. Watson (1954), 130 C.A.2d 24, 33, 278
P.2d 454;

Stevens v. Curtis (1953), 122 C.A.2d 30, 35,
264 P.2d 606.

While the burden of proving such defenses is on the insurance company, it does not have to be proved beyond "reasonable doubt" as required in a criminal prosecution; but the insurance company has met its burden when any of said defenses is established by a preponderance of the evidence, because it is a civil case.

Sec. 2061 (5), C.C.P.;

Treadwell v. Nickel (1924), 194 Cal. 243, 260,
228 P. 25;

Singleton v. Hartford Ins. Co. (1930), 105 Cal.
App. 320, 326, 287 P. 529.

II. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH INCENDIARY FIRE.

Shortly, before 12:21 P.M., on Monday, June 25, 1956, a fire occurred inside a two story frame building, occupied by Eureka Lumber Company, at the NW corner of Third and Commercial Streets, Eureka, California, damaging certain personal property (407-8, Ex. "A", 49, 431).

A. Description of Building.

It fronted 92 feet from east to west along the north side of 3rd Street; and it was 100 feet long from south to north. The west $\frac{1}{2}$ of the building was an open shed area with a dirt floor. The east $\frac{1}{2}$ had a wood floor, four main rooms on the first floor and a second floor office and storage rooms (411). A wood partition, extending from the ground to the roof separated said West and East $\frac{1}{2}$ s of the building (Ex. "A" 431, 166). West of the building was an open storage yard extending to Broadway (80).

The four rooms on the first floor (designated Southeast, "SE"; Southwest, "SW"; Northwest "NW"; and Northeast "NE", respectively) each was approximately 20' wide from East to West. The SE room was an office, and a display and retail sales area with shelving along the east and west walls (Photos Ex. G, V, W, P; 413-416, 102); at its East wall, a loading door marked "II" on Diagram Ex. "A", opened onto Commercial Street (Photo Ex. "O", 379-380); at its north wall, a door opened into the NE room, which was a storage room (Photo Ex. "F", 416,

101). At the north end of the NE room, door marked "III" on Ex. "A", opened into an alley (240, 410). The SW room was a storage area; in its north wall, a door opened into the NW room, where a Kaiser automobile was kept (Ex. "A", 439, 100). At the north end of the NW room, a door marked "IV" on Ex. "A" opened into said alley (241).

There was one front door to said East $\frac{1}{2}$ of the building, and it was marked "I" on Ex. "A" (240). From 3rd Street, the front door opened onto a landing leading to the SE room on the east and to the SW room and a wooden stairway leading to the 2nd floor on the west.

There was no door between the first floor NE and NW rooms or the SE and SW rooms (Ex. "A" Diagram), but in the partition dividing the building in $\frac{1}{2}$, a door, marked "V" on Ex. "A", opened from the SW room into the West $\frac{1}{2}$ of the building (241).

All the outside doors marked II to V, inclusive, in said East $\frac{1}{2}$ of the building, were locked from the inside of the building, but front door marked "I" opening onto 3rd Street had an outside lock (239-241).

The West $\frac{1}{2}$ of the building was open from the dirt floor to the corrugated roof, which was supported by exterior walls, open wood trusses supported by approximately eight 6x6" wood columns (Diagram Ex. "A", 392). At the north wall of said West $\frac{1}{2}$ of the building, two open doorways led into said alley, and at the south wall two open doorways led into 3rd Street.

The total dirt floor area was approximately 2,300 sq. feet (46'x50') (Ex. "A" Diagram).

B. Description of Contents of West ½ of Building.

In the southeast section of the West ½ of the building, there was a portable sawmill with a Diesel engine, but it was not operated as a sawmill (150). The sawmill was approximately 40' long, extending from the easterly open front doorway north along said dividing partition (Ex. "C", 149, 145; Ex. "D", "AC", 506-7). The sawmill was movable on tracks set on 12 x 12" logs with a log bumper at the north and south end of the tracks (145, 147). There was approximately a 4 to 5' space between the east edge of the mill and said dividing partition (512 Ex. "AC", "AT").

On the west side of the mill and midway between the bumpers the Diesel engine extended westerly from the mill (Ex. "C", "D" and "AC"; Diagram Ex. "A").

Two days before the fire, James Ragsdale moved a sawmill, which he had been constructing for several weeks, out of the southwest section of the West ½ of the building (86, 355, 370).

Appellee claimed and testified that at the time of the fire, and for more than a month prior thereto, 66,000 board feet of redwood molding and window casings and 35,000 board feet of fence board were stacked in the following areas in the West ½ of the building:

- (1) Along the west wall, from the area used by Ragsdale to the Northwest doorway, extending

out from the west wall 6 to 8 feet at an unknown height (143, marked Redwood on Ex. "A");

(2) Along the east wall between the portable sawmill and the dividing partition of the building; and, from the north bumper of the portable sawmill to the north wall of the building;

(3) On top of a platform of the portable sawmill.

Such areas are marked X¹ to X⁷ on Ex. "A" (142-145, 150-162).⁶

C. Point of Origin of the Fire Was at the Floor Level of the SW Room.

The fire originated in the northerly portion of the SW room at floor level, where deep seated charring of the floor showed that an inflammable liquid had been poured on the floor (431-432, 445-448).

(1) *Neal A. Jensen*,⁷ who worked for the Company before and after the fire (393), was in the front ground floor office of Louis H. Hess at the northeast corner of 3rd and Commercial Streets, when he heard an explosion; and, looking out of the west windows of the Hess office, he saw a volume of smoke coming out of the Eureka Lumber Company building. Immediately, he ran to the front door marked "I" of the Company but could not enter because it was locked (394, Ex. T, 397-9). He entered the front opening in the west 1/2 of the building, and proceeded to the

⁶Other employees contradicted Appellee: John Roberts (2000 bd. ft.) (355 to 357, 360); John E. Wilson (368, 370-371); Ellen Van Harpen (485, 492-494, 504-505).

⁷He is not related to Appellee.

back end of said portable sawmill to position "J" on Diagram Ex. "A". There was no fire west of the partition dividing the east and west $\frac{1}{2}$ s of the building, but all the fire was east of such partition in the southwest room (400-402). Neal A. Jensen hurried back to the Hess office to inquire about the fire department, then returned to the subject building and entered the westerly front door, to a point half way back in the west $\frac{1}{2}$ of the building. At this time the fire was breaking through the dividing partition at the floor and along the roof levels (402-3, Photo Ex. "AD").

(2) After the loading door ("II") (Ex. "O") in the east wall of the first floor southeast room was forced open, *Fireman Orlen Howard* entered said southeast room and observed fire burning through the westerly wall of said southeast room, just below ceiling level at H' Diagram Ex. "A" from the SW room, and little spot fires were in the ceiling of SE room (Ex. "P"). Then Howard proceeded southerly to the front of the office in the SW room (Photo Ex. "G") (376, 379-381).

(3) After the north door (III) in the NE room first floor was forced open, *Fireman Harold McBeth* entered the NE room, which was filled with smoke, and proceeded to a ladder in the southwest corner of the room. He climbed the ladder and found flames in the second floor office which were put out. The fire was coming from the 1st floor SW room (406, 410-12).

After the fire was out, Fireman Harold McBeth examined the entire premises to determine the point

of origin. In his opinion, it originated in the first floor southwest room at the wooden floor level in the northerly portion of the room area marked M¹⁻² on Diagram Ex. "A", where said deep seated charring of the flooring showed an inflammable liquid had been poured on the floor (431-2; 445-8). From this area the fire spread into said West 1/2 of the building and the second story of the building (433-7, Photos Ex. P, AD to AI, inclusive).

No evidence was offered to show the fire did not originate at or originated at a point other than the floor area of the SW room.

D. Finding of a Criminal Agent at Point of Origin Is Evidence of Incendiary Fire.

The presence of diesel fluid at the point of origin of a fire is sufficient to establish a fire is of incendiary origin.

In:

People v. Gilyard (1933), 134 C.A. 184, 189,
25 P.2d 35,

the Court pointed out:

"A jar of earth, taken by the police from beneath the partially burned house and giving forth the odor of kerosene, was admitted in evidence. There was no error here, as this real evidence tended to prove that the fire was of incendiary origin."

In:

People v. Kasparoff (1928), 94 C.A. 7, 9-10, 270
P. 398,

a partially burned rug had kerosene odor.

1. Not Necessary to Show Exact Method by Which Fire Started.

It is not necessary to establish the exact method by which the fire was started,

People v. Hays, 101 C.A.2d 305, 311, 225 P.2d 600;

People v. Maas (1956), 145 C.A.2d 69, 75, 301 P.2d 894.

E. Evidence of Use of Liquid Inflammables to Cause Fire Found at Point of Origin.

Although he testified that he could not state his opinion as to the cause of the fire (443), Fireman McBeth found at the point of origin in said first floor SW room an open 5 gal. container with odors of diesel fluid in it, a 50 gal. drum of gasoline with its pump loosely affixed (440), and physical evidence that inflammable fuel had been added to the floor, where the fire started (445-446). Also, in the same area were squares of asphalt roofing shingles and plywood (101).

There were no natural sources of fire, such as heating devices (445); or any electric wiring at said point of origin.

No evidence was offered by Appellee or Third Party Defendant H. D. Jensen to account for or to explain the presence of such an open diesel fluid container or such a loosely affixed pump in this area used to store said shingles or plywood.

Therefore, the jury was entitled to infer that such diesel fluid was used to cause the fire and gasoline fumes allowed to escape to contribute to the rapid spread of the fire.

F. Evidence of the Use of Liquid Inflammables Was Found and Present in Area of Lumber Debris.

Containers with inflammable diesel liquids had been placed in the area where Appellee has testified red-wood molding was stacked in the area of the sawmill (167, Diagram Ex. "A", 142-145, 150-162). Fireman Alfred Breen cut a hole in the west wall of the building, about $\frac{1}{3}$ of the way from Third Street (Photo Ex. "Q", "R"). He proceeded to the area at the north end of the sawmill, where he found a "Stubborn" fire in a wood pile, which he had difficulty in extinguishing. In fighting the "stubborn fire" he smelled odors of petroleum products (384, 386-7).

In examining this same area adjacent to the sawmill after the fire, Fireman Harold McBeth found a one gal. open top container in such wood debris and another one gal. open top can at M⁵ on Diagram Ex. "A", which contained a burnt rag with odors of diesel (418-420, 437-439, Photo Ex. Z, "AA", "AJ").

No evidence was offered by Appellee or Third Party Defendant H. D. Jensen to account for or explain the presence of such open diesel fluid containers and the rag in an area stacked with molding.

G. Appellee Told Fireman It Was Set Fire.

At the scene of the fire, Appellee told Fireman McBeth that "I think somebody set it afire." (114).

III. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH H. D. JENSEN SET THE FIRE.

The identity of the person or persons who caused the fire may be proved by circumstantial evidence such as proof of motive and conduct which tends to connect the person or persons to the origin of the fire,

People v. Hays (1950), 101 C.A.2d 305, 311,
225 P.2d 600.

A. H. D. Jensen Had the Opportunity to Set the Fire.

On the morning before the fire, H. D. Jensen was in the immediate area of the point of origin twice. He drew a $\frac{1}{2}$ gallon of gasoline in a service station can from the 50 gallon gasoline drum in the SW room, and placed the gasoline in his 8 year old son's car in front of the building and left the can in the back of the car (526-528). Also, Bookkeeper Ellen Van Harpen called him from the SW and Kaiser rooms during the morning (495).

The only employees at the building the morning of the fire were Ellen Van Harpen, Appellee and H. D. Jensen. Although other employees reported to work, they were told there was no work (370, 494, 528).

After Appellee left for lunch with H. D. Jensen's son, Ellen Van Harpen and H. D. Jensen were the only persons left at the building; and, when Ellen Van Harpen left for lunch at 12:05 p.m., H. D. Jensen was the only person in the building (495, 245); and, he remained alone in the building with access to the SW room until shortly before the explosion was heard (529, 532, 261).

No evidence was offered by Appellee that H. D. Jensen did not have an opportunity to set the fire.

B. The Building Was Locked Up by H. D. Jensen.

There were three keys to the front door, one each held by Appellee, Ellen Van Harpen, and H. D. Jensen (239-240, 532).

All the doors (marked II to V, inclusive on Ex. "A") in the East $\frac{1}{2}$ of the building had inside locking devices and were locked from the inside at the time of the fire. Referring to the door marked "V" in said dividing partition, Appellee stated: there was generally "quite a pile of lumber and stuff piled against that one door" (242). The front door marked "I" Ex. "A" (240-243, 529-533), was locked by H. D. Jensen when he left (532), and it was still locked when the fire was discovered (399). The fire department forced its way in through other doors (379, 411).

The fact that a person locked up the building prior to the fire and the fire department had to force an entry into the building to fight the fire has been held to be material evidence to connect such person with setting the fire,

People v. Becher (1949), 94 C.A.2d 434, 441, 210 P.2d 871;

People v. Kessler (1944), 62 C.A.2d 817, 823; 145 P.2d 656.

There was no evidence to establish that anyone entered the building between the time H. D. Jensen locked the front door of the building and when he was seen by Percy L. Musser fleeing the scene of the fire.

C. Flight of H. D. Jensen From the Scene of the Fire Immediately Before the Fire Was Discovered.

Where a person flees from the scene of a fire, a Jury may infer that such person was conscious of some guilt or responsibility for the fire,

See:

Brooks v. E. J. Willig Truck Transportation Co. (1953), 40 Cal.2d 669, 676, 255 P.2d 802.

H. D. Jensen was observed as he fled from the building.

On the Monday morning of the fire, the only persons working at the Company were Ellen Van Harpen, who had been the bookkeeper for one year and handled retail sales (528, 494, 195, 222), H. D. Jensen and Appellee. Other employees reported to work the morning of the fire (370), but were not put to work. H. D. Jensen's 8 year old son and a companion were at the premises. About 12:05 P.M.,⁸ H. D. Jensen had Appellee take the two boys out for lunch (113, 244). Ellen Van Harpen testified that at 12:05 P.M. she and H. D. Jensen were the only persons in the building; then, she left H. D. Jensen in the 1st floor office SE room, and went out to lunch, leaving him alone in the building. She drove her car one block to the Blue Ox Cafe, seated herself in the cafe and had ordered her lunch when she heard the fire trucks going by (494-6).

⁸After the fire Appellee told Fireman Harold McBeth that he left at 11:40 A.M., and H. D. Jensen told McBeth that he left the building between 5 to and 5 after 12 (429).

1. *Percy L. Musser*, who operates a motor transportation business at the southeast corner of 3rd and Broadway Streets, was in his office (Photo Ex. "C"), when he heard an explosion. Immediately afterwards, Musser saw H. D. Jensen driving West from the direction of the subject building on 3rd Street "very fast"; Jensen cut the corner and drove over some concrete at the corner of Musser's property and came to a sudden stop; quickly Jensen opened and closed his pickup door, spun his tires around and drove south on Broadway away from the fire. With an unobstructed view out of his window, Musser saw fire at the peak of the roof of the subject building, where the centre wall (dividing partition) goes through, marked "1", on Photo Ex. "L". Then Musser telephoned the fire department, because no alarm had sounded (258-264).

The fire alarm was received at 12:21 P.M. (408, Ex. "U").

Under cross-examination, H. D. Jensen admitted that he was at the building until about 12:15 P.M. (529).

D. H. D. Jensen and Appellee Made Inconsistent Statements.

Inconsistent statements by a person have been held to show a consciousness of guilt,

People v. Hays (1950), 101 C.A.2d 305, 311,
225 P.2d 600.

Among the inconsistent or contradictory statements made by Appellee and H. D. Jensen as to material points are: Following the fire in the presence of each

other, H. D. Jensen told Fireman Harold McBeth that he left the building between 5 to 12 noon and 12:05 p.m., and Appellee stated he left the building at 11:40 A.M. (429). Later, Appellee said he left about 12:05 P.M. (113, 244) and H. D. Jensen said he left about 12:15 p.m. (529). Also, as to the time and origin of the fire Appellee changed his statement from "12 noon" (Ex. K) and "I think somebody set it afire" (114) to an unknown time and origin (245-246).

Therefore, from the conduct and inconsistent statements of H. D. Jensen and Appellee the Jury was entitled to infer that H. D. Jensen and Appellee were conscious of some guilt for this fire.

E. H. D. Jensen Had a Motive to Set the Fire.

The evidence establishing a financial motive on the part of H. D. Jensen is set forth in the following Section V—Re: Motive.

IV. EVIDENCE LEGALLY SUFFICIENT TO ESTABLISH A CONSPIRACY BETWEEN H. D. JENSEN AND APPELLEE.

A conspiracy is inferrable from the nature of the acts done, the relations of the parties, the interest of the alleged conspirators and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy,

Siemon v. Finkle (1923), 190 Cal. 611, 615, 213 P. 954;

James v. Herbert (1957), 149 C.A.2d 741, 747, 309 P.2d 91.

It is not necessary to establish a formal agreement, *Siemon v. Finkle*, supra. Fraudulent designs and conspiracies may be established without any direct proof, *McPhetridge v. Smith* (1929), 101 C.A. 122, 142, 281 P. 419.

The jury has the right to reject the direct testimony of the conspirators, *Johnstone v. Morris* (1930), 210 Cal. 580, 590, 292 P. 970.

The relationship of Appellee and H. D. Jensen, the acts done by them, the circumstances surrounding the fire, proof of loss, and the refusal to produce books and invoices and H. D. Jensen for examination under oath establish a conspiracy to defraud.

Appellee and H. D. Jensen were father and son. H. D. Jensen made his home at Appellee's house at 2434 E Street, Eureka, for more than 1 year prior to the fire, although he had an eight year old son (232-233, 77, 282, 288). Between 1950 to 1953, H. D. Jensen operated a small saw mill on the Hansen Road near Eureka, which he leased from Appellee, and Appellee worked with or for H. D. Jensen as an employee (225, 226). During such operation, H. D. Jensen acquired liabilities of \$133,315.41, and some assets, including an account receivable from the Alert Lumber Company,⁹ and such liabilities were outstanding when

⁹The Court is requested to take Judicial Notice that on October 13, 1955, in the U. S. Dist. Ct. Northern Dist. of Calif., Bankruptcy No. 15035, H. D. Jensen filed a voluntary petition in bankruptcy with liabilities of \$133,315.41 incurred during said mill operation;

such mill was traded to Grover Cable for the Eureka Lumber Company business. The trade was evidenced in a document executed by H. D. Jensen, Appellee and Cable (227-229 Ex. J for Iden.). Cable conducted his Eureka Lumber Company business through the Alert Lumber Company, Inc. (283); the Alert Lumber Company was indebted to H. D. Jensen at the time of the trade, and at the time of H. D. Jensen's bankruptcy, the indebtedness was still approximately \$50,000.00 (Bankruptcy Petition).

Following the trade, H. D. Jensen arranged for the purchase of real property, where the business was conducted, from Anna Hess. The deed was taken in Appellee's name (231). Printed letterheads of the Eureka Lumber Company showed H. D. Jensen to be its Sales Manager and Appellee its General Manager (230). During the 2½ years the business was operated prior to the fire, Appellee worked primarily in the yard, handling the re-manufacture, transferring and loading of lumber (82). H. D. Jensen handled the books of account, sales, finances of the Company (137), determined when the accounts payable were to be paid (230-231), "bought a lot of the lumber" (230), arranged for the fire insurance (61), opened a bank account in his own name in which deposits were made from Appellee's account allegedly for

assets of \$54,975.00 including accounts receivable from Alert Lumber Co. of \$50,000.00,

Lopez v. Senope (1953 Cr. 9), 205 F.2d 8, 9;

Wells Fargo Bank & Union Trust Co. v. McDuffie (1937 Cr. 9), 88 F.2d 382, 384.

See:

Pailhe v. Pailhe (1952), 113 C.A.2d 53, 66, 247 P.2d 838.

lumber purchased by H. D. Jensen for the Company (233, 559); although demanded, no supporting invoices were ever produced (559-560), and such account was opened after H. D. Jensen's adjudication in bankruptcy. Thereafter, many of the Company's deposits were made in H. D. Jensen's account, and overdrafts were developing in Appellee's account. H. D. Jensen also prepared and furnished for Appellee's execution financial statements, including the financial statement of June 1, 1956, to the Crocker-Anglo Bank (Ex. 17 and 18, "AY" 195, 198, 201), wherein they substantially understated liabilities and overstated accounts receivable. H. D. Jensen ran his personal business through the Company (234).

On the morning of the fire other employees reported to work, but they were sent away by Appellee and H. D. Jensen and did not work (370, 494, 528). Around 12 noon Appellee took H. D. Jensen's son and playmate to lunch, leaving H. D. Jensen free to set the fire; after the fire, Appellee stated he left the premises at 11:40 A.M. and H. D. Jensen stated he left between five to 12 and 12:5 (429). Later, the departure time was put back to 12:05 P.M. and 12:15 P.M. respectively (113, 244, 529), and the time of the origin of the fire was changed from "12 noon" to a "I don't know" (245-248, Ex. "K").

Following the fire, H. D. Jensen furnished the information for the Proof of Loss and checked it before Appellee subscribed to it (135, 270, 525-526). Under oath on October 12, 1956, Appellee testified that he had no knowledge of the records of the Company or

whether any of the books were destroyed in the fire (223); further, he stated that he couldn't say how much merchandise there was in the fire (224). Counsel for Appellee received written notice to Appellee and H. D. Jensen for the respective examinations under oath (Ex. H, 204-5). Appellee's counsel told Appellee he was to be examined under oath and he told H. D. Jensen that he was to be examined under oath. Appellee appeared but H. D. Jensen did not. At the time scheduled for H. D. Jensen to appear for such Examination, Appellant offered to prove that Appellee sent H. D. Jensen out of Eureka (210, 217). At the time of the fire, the Company had a complete set of books and invoices which were not destroyed in the fire (221, 486, 485-492). Immediately, after the fire, H. D. Jensen took care of all the records and inventory of the Company (237-238), including the accounts receivable book (572-5). Appellant made written requests to the Company, Appellee and H. D. Jensen to exhibit the complete books and invoices to Russell M. Stearns, a C.P.A., but material records and invoices were not exhibited to Stearns (Ex. AU, 545, 547-8, 550; Ex. H; Ex. AV, 549-550).

After the fire, H. D. Jensen operated business under the name of Eureka Lumber Company (235), and Appellee sought to transfer trucks of the Company to H. D. Jensen (235-6).¹⁰

Also, the Jury was entitled to consider the circumstances surrounding the fire as evidence bearing on

¹⁰Witness Hanna (522) would have testified the trucks were voluntarily transferred to H. D. Jensen by Appellee (Ex. AP for Identif.—523).

the fraud, concealment and conspiracy. In *Orenstein v. Star Ins. Co.* (1926 Cr. 4th), 10 F.2d 754, 757, the Court pointed out:

“It appeared that this estimate of value was grossly excessive, and the circumstances surrounding the fire were such as to warrant the conclusion that it was wilfully false and fraudulent.”

Or, as stated by this Court in *Hyland v. Millers Nat. Ins. Co.* (1937 Cr. 9th), 91 Fed.2d 735, 744:

“Furthermore, Hyland’s credibility is seriously weakened . . . by the fact that he told the insurance companies in his proofs of loss that he had no knowledge or belief as to the origin of the fire, when there is ample evidence he was well aware of its incendiary origin.”

V. APPELLEE AND H. D. JENSEN HAD A FINANCIAL MOTIVE TO DEFRAUD, CONCEAL, AND ENTER INTO A CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND PRESENTING A FALSE PROOF OF LOSS.

A. Evidence of Financial Condition Admissible to Establish Motive, and to Connect Party With Incendiary Fire.

Financial condition is admissible to show that a person has a motive to set a fire,

People v. Freeman (1955), 135 C.A.2d 11, 14, 286 P.2d 565—heavily in debt;

People v. Richard (1951), 101 C.A.2d 631, 637, 225 P.2d 938—business not a paying proposition;

People v. Sherman (1950), 97 C.A.2d 245, 249, 217 P.2d 715—indebted for rent;

or to connect Appellee and H. D. Jensen with the fraud, concealment, conspiracy or incendiary fire,

People v. Hays (1950), 101 C.A.2d 305, 311,
225 P.2d 600.

The fact that such financial condition is prejudicial to a person does not make evidence of financial condition inadmissible,

People v. O'Brand (1949), 92 C.A.2d 752, 754,
207 P.2d 1083;

nor does the fact that it may discredibly reflect on him,

People v. Soeder (1906), 150 Cal. 12, 15, 87 P.
1016;

People v. Weston (1915), 169 Cal. 393, 397, 146
P. 871.

As pointed out in *People v. Richard*, supra:

“in cases where circumstantial evidence is largely relied upon for conviction . . . then *motive* becomes a *matter of earnest inquiry*.” (Emphasis supplied.)

B. Their Poor Financial Condition Established by Evidence.

Appellee and H. D. Jensen had a financial motive to enter into a conspiracy to defraud Appellant by setting the fire and presenting a false proof of loss. While some evidence of their poor financial condition was admitted in evidence, other material evidence was excluded by the trial court's rulings. In the fall of 1955, a slump developed in the Company's business, which slump continued through the fire on June 25, 1956—it was worse at the time of the fire (225). In

the fall of 1955, H. D. Jensen was adjudicated bankrupt (232).

On June 22, 1956, an attachment closed the bank account of Appellee (202).

Salaries of employees John Roberts, Ellen Van Harpen and John E. Wilson were not met at the time of the fire, and, early in June, Appellee had asked an extension of time from employee John Roberts (180, 181, 362, 373, 486). More than \$800.00 was owed the Western Door & Sash Company (280); and, about \$1300.00 was payable to Rice Supply Company (315). The Company was H. D. Jensen's principal source of income (234), and at the time of the fire he was indebted to Appellee (232). For the first six months of 1956, the company's payroll records did not reflect any salary payments to H. D. Jensen or any withholding taxes for him (560). There was no evidence to indicate that following his bankruptcy H. D. Jensen acquired any substantial assets. Up to April 20, 1956, the moneys of the Company were deposited in H. D. Jensen's bank account to keep his checks from bouncing (233).

In the absence of the Court's ruling, Appellant would have proved: Late in 1955, Appellee purchased a home from G. R. Abrahamsen for \$37,500.00. After a small down payment, Appellee obtained a loan of \$14,000 from the Bank of America, evidenced by a note and trust deed; and Appellee executed a note and second deed of trust to Abrahamsen for \$18,624.58, which was payable \$5,000 on February 1, 1956, and the \$13,624.58 balance on May 2, 1956 (Ex.

“AR” for Iden.). Appellee defaulted on the \$13,624.58 payment due Abrahamsen on May 2, 1956, and Abrahamsen called the default to his attention (Ex. “AR” for Iden. 535-6). On June 14, 1956, Appellee furnished said financial statement Ex. 18 to Crocker-Anglo Bank to obtain a loan of \$5,000.00,¹¹ which on June 18 was paid on the delinquent balance to Abrahamsen, leaving the unpaid delinquent balance at \$8,624.58. Such financial statement was false in that:

(1) Liabilities of Appellee were greatly understated and accounts receivable overstated (Witness Russell M. Stearns would have testified the liabilities were \$169,748.40—not \$95,679.00—and receivables were \$2,998.32—not \$29,404.08).

(2) A piece of property (Freshwater parcel) was listed as owned by Appellee, whereas at the trial he testified it belonged to H. D. Jensen (231).

(3) Appellee’s net profit for 1955 was overstated by \$20,000.00 (Copy U. S. Tax Return 1955, Ex. “I” Iden.). After April 20, 1956, the average balance in H. D. Jensen’s account was less than \$100.00 (Witness Russell M. Stearns 559-562); and deposits into H. D. Jensen’s account were stopped because of outstanding bad checks against the account (Witness Ellen Van Harpen 502); at the time of the fire and prior thereto, Appellee was unable to meet current obligations of the Company and Appellee’s liabilities

¹¹While admitting that he may have owed more than said \$5,000.00 bank note, Appellee stated he didn’t know how much he owed on other notes, or the amount of accounts payable, or if the accounts payable increased during June, 1956 (200-201).

were approximately \$169,748.49 (Witness Russell M. Stearns 561). There was an account payable to Lumber Wholesaler of approximately \$18,000; and, the morning of the fire a representative of the Northwestern Railroad pressed Appellee and H. D. Jensen to pay a delinquent account of more than \$1,000 which H. D. Jensen promised to pay in the afternoon, but there was no money to cover such payment (Witness Ellen Van Harpen 503). Payments due YMAC were delinquent on the truck and trailer (Witness Richard Hanna 523). Since January, 1956, sizeable overdrafts appeared in Appellee's account and sizeable overdrafts continued to appear during each of the following months up to the fire (Witness Russell M. Stearns).

Therefore, there was substantial evidence to support a finding by the Jury that Appellee and H. D. Jensen had a financial motive to defraud, conceal, conspire to defraud, set said fire and file a false proof of loss; and to infer that Appellee and H. D. Jensen were connected with said fraud, concealment and conspiracy.

C. Error to Admit Testimony of Witness A. J. Franceschi Re: Credit Standing.

In the direct examination in the deposition of A. J. Franceschi, Appellee asked the following question relating to credit standing to which Appellant made the following objection which was overruled by the trial court:

“Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?

Mr. Castro. Objected to as irrelevant, incompetent and immaterial, no bearing upon any issue in this case.” (Dep. 5.)¹²

and

“Q. On June 25th, 1956, what was the credit standing of the Eureka Lumber Company with your bank?

Mr. Castro. Objection to that, your Honor, on which we stand.

The Court. I will overrule the objection.

A. As far as we were concerned, it was good.”
(71.)

The “credit standing” of a Company, in substance a credit reputation with the bank, is inadmissible, because there was no issue before the Court relating to the Company’s credit standing or reputation with the bank. Even assuming its credit standing with the bank was good, it would not disprove the fact that Appellee and H. D. Jensen were in poor financial condition—Appellee’s account with this bank was closed by an attachment 3 days before the fire (202) and not reopened prior to the fire; H. D. Jensen was adjudicated a bankrupt less than a year before the fire (232) and was dependent on the Company for his income (234). See “VB—Poor Financial Condition Established by Evidence”.

¹²The quotation appeared in the deposition and was read silently by the Court. Appellant requests that the record be supplemented to include such objection.

**VI. THE COURT ERRED IN EXCLUDING EVIDENCE
OF FINANCIAL CONDITION.**

In an opening statement to the Jury, Appellant stated evidence would be offered to establish Appellee and H. D. Jensen had a financial motive to defraud Appellant and to enter into a conspiracy to set the fire and file a false Proof of Loss to defraud Appellant (57).

In his case in chief, Appellee placed in evidence net profit from the Eureka Lumber Company business in 1954 of \$5,000.00, but he couldn't recall the net profit for 1955 (128, 129);¹³ and statements showing his financial condition as of the close of business on December 31, 1955 (131, Ex. 17) and on June 1, 1956 (131-2, Ex. 18). Appellant's objection to each financial statement on the grounds of hearsay was overruled (131). Such statements were not prepared by Appellee, and he didn't know the amount of notes or accounts payable (195, 200-201). Earlier, the Court overruled Appellant's motion to strike a non-responsive answer of Appellee's witness A. J. Franceschi that, loans had been made to Appellee on an unsecured basis and were always taken care of as agreed (67-68). Over Appellant's objections, Franceschi further testified the Company's credit with the bank was good (71).

Notwithstanding its foregoing rulings, the trial court announced, during the cross-examination of Appellee, that it would not allow Appellant to cross-

¹³Ex. "F" identif., copy of a 1955 U.S. Tax Return of Appellee, reflected it was \$19,732.12 (568).

examine Appellee as to his financial condition until some preliminary foundation was laid as to the origin of the fire (203-204).

During the cross-examination of Appellee, the Court refused to allow Appellant to question Appellee as to the amount of money owed at the time of the fire (225); financial background of H. D. Jensen (226); and checks issued by Appellee which were not honored (233).

Later in the trial, when Appellant sought to offer direct evidence of financial condition of Appellee and H. D. Jensen, the Court rejected the evidence stating no foundation had been laid to show a "corpus delicti" (499); and at the court's suggestion Appellee moved to strike said financial statements from the record, (563) which was done, but the rest of the record made by Appellee of his financial condition stayed in the case.

Apart from the evidence listed in section "V(B)—Poor Financial Condition Established by Evidence", above, the Court refused to allow Appellant to prove the financial condition of Appellee and H. D. Jensen. Appellant made offers of proof pointing out such evidence was admissible to show motive to conspire to set the fire or falsify the Proof of Loss (498, 501).

Appellant offered to prove through:

(a) Witness Ellen Van Harpen, the bookkeeper for the Company at the time of and for the past year before the fire, that drawees of checks from H. D. Jensen were holding outstanding ones, because there

were insufficient funds to honor the checks, and no money was deposited in H. D. Jensen's account for several weeks because of such outstanding checks; approximately \$18,000.00 was past due Lumber Wholesale Company; the Northwest Railroad Company was pressing to collect more than \$1,000.00 past due for freight which H. D. Jensen promised to pay the afternoon of the fire; and there were no funds to make such payment (502-503).

(b) Witness Russell M. Stearns, C.P.A., who made an audit of the financial condition of Appellee, H. D. Jensen and Eureka Lumber Company at Appellant's request, would have testified: the Financial Statement as of June 1, 1956, to the Crocker-Anglo Bank (Ex. Ay) was untrue in that liabilities were \$169,748.40—not \$95,679.00, and accounts receivable were \$2,998.32—not \$29,404.08; the dates and amounts of overdrafts during the first six months of 1956; the borrowing of money to satisfy the overdrafts and attachments on the bank account; the relationship between the respective bank accounts of Appellee and H. D. Jensen and shifting of money between them; the average balance of H. D. Jensen's bank account was less than \$100.00 after April 20, 1956, through the fire; Appellee and H. D. Jensen were unable to meet current obligations of the Eureka Lumber Company business (561-564).

(c) Witness Richard Hanna, representative of YMAC, which held the finance contract on the truck and trailer, which Eureka Lumber Company was buying from Dayton Murray Truck Sales: that the ac-

count was delinquent at the time of the fire; and after the fire Appellees, voluntarily, transferred such truck to H. D. Jensen who assigned it to Robert Halverson for a consideration (523-524).

(d) Witness G. R. Abrahamson, who sold the dwelling to Appellee, would testify: that the purchase price was \$37,500.00, and as a part of the payment, he received appellee's promissory note for \$18,624.58, payable \$5,000.00 on February 1, 1956, and \$13,624.58 on May 2, 1956; after Appellee failed to pay the \$13,624.58 Abrahamsen notified him that it would have to be paid, but the installment was delinquent at the time of the fire except for \$5,000.00 paid June 18, 1956 (535, Ex. AR for Iden., pages 3 to 5).

(e) Witness A. J. Franceschi, Manager of Crocker-Anglo Bank at Eureka, would testify: that on the purchase of the dwelling from Abrahamson, Appellee borrowed \$14,000.00 from the Bank of America, which was evidenced by a promissory note and first deed of trust recorded in Book 354, Official Records, page 27, Humboldt County Records; that Crocker-Anglo Bank loaned Appellee \$5,000.00 on March 1, 1956, and another \$5,000.00 on June 18, 1956; series of commercial loans were made to Appellee with the new loan paying off part of the old Loan (536, Dep. A. J. Franceschi, Ex. AS for Iden. pages 4 to 8, 9, 10 and Ex. D attached to his dep.). Also, Franceschi would have testified: attachments were levied on Appellee's bank account on January 5, 1956 for \$2,472.00; February 10, 1956

for \$530.00; and June 22, 1956 for \$2,255.04, when the account was closed out; H. D. Jensen opened a bank account in his name on November 22, 1955, with a deposit of \$300.00, which was closed November 25, 1955; and on December 5, 1955, H. D. Jensen opened a bank account in his name with a deposit of \$350.00.

At the time the offers of proof were made Appellant had established by the evidence, at least, a *prima facie* showing of a conspiracy to defraud by setting the fire and filing a false Proof of Loss.

A. Uncontradicted Showing Fire Was of Incendiary Origin.

There was an uncontradicted showing that the fire was of incendiary origin. There was substantial evidence to show that inflammable diesel fluid was used to cause and contribute to the spread of the fire. The charred flooring at the point of origin in the SW room showed evidence of an inflammable fluid being used, an open 5 gal. container with diesel odors was in the area and the pump on a 50 gal. gasoline drum was loosely affixed permitting fumes to escape; and two open 1 gal. containers (one with a partially burned rag), with diesel odors were found in a stack of lumber, which Appellee has described as top grade redwood molding worth from \$200 to \$280 per thousand. Such containers are not ordinarily kept among the saleable merchandise (see: Argument "II"—"Evidence Legally Sufficient to Establish Incendiary Fire", Sections "C to G").

B. Evidence Showed Proof of Loss Was Fraudulent.

There was substantial evidence that a false Proof of Loss was submitted to Appellant.

(1) Quantity of Stock and Amount of Damage Substantially Exaggerated.

After the fire, Appellee executed a sworn statement in Proof of Loss (Ex. K, 248) for Eureka Lumber Company and filed it with Appellant. It placed the cash value of the total stock at the time of loss at \$63,549.34; the whole loss and damage at \$33,549.54; and claimed the policy limits of \$20,000 (4-5, 132, 135). Attached to such Proof of Loss were three exhibits: Ex. "A" consisted of five pages of items, totaling \$12,949.50; Ex. "B" was entitled "Completely Destroyed Inventory Entirely Consumed By Fire", totaling \$20,600.00; and Ex. "C" was entitled "Inventory Undamaged By Fire" consisting of assorted lumber outside the building, totaling \$30,000.00.

Third party defendant H. D. Jensen furnished the information for and checked the Proof of Loss before it was executed by Appellee (78, 135, 333-334, 525-526). After the fire, Eugene L. Fox helped H. D. Jensen take a physical inventory of the stock items listed at pages 1 to 5 in said Ex. "A", but Fox did not determine the value of such items (Ex. 19, 266, 270).

Appellee's 1955 U. S. Tax Return reflected the inventory as of December 31, 1955, was \$15,478.11 (Ex. "I", Iden., 570-1); and said financial statement of June 14, 1956, reflected an inventory as of June 1, 1956, at \$28,080.00 (Ex. "AY", 571).

Employees of the Company were familiar with the area in the west half of the building. *John Roberts*, former yardman, stated that 10 days to 2 weeks before the fire there was approximately 2,000 board feet of lumber in the whole building, including about 1,000 board feet marked in the areas delineated X^{3-4-5} by Appellee; there was no redwood molding stored along the west wall, but there was some drop siding; during the year that Roberts worked at the premises (353-4) no molding was remanufactured (359); after the fire, Appellee asked Roberts how much lumber burned up in the building (355-357, 360). *John E. Wilson*, a driver and general workman of the Company, drove a lumber stacker in the west half of the building two days before the fire and picked up some boxes and irons for Ragsdale (370); and the only lumber in the building was scattered around on the floor; from March, 1956, to the fire he did not see any lumber being stacked or stacked in the west half of the building (368, 370-371).

Ellen Van Harpen, bookkeeper for the past year before the fire, testified the only lumber in said west half of the building was in a criss-cross pile three or four high, covering a 12 x 14' space in the area delineated by Appellee as X^{5-3-4} on Diagram Ex. "A"; and, during the year she worked, no shipment had been stored in the west half of the building (485, 492-494, 504-505).

Therefore, IT WAS NOT kiln-dried molding, piled in units either strapped tight or strippers put between the layers or stakes, 6 to 13 feet or 4 to 9 feet high,

4 feet wide and 22 feet long as testified by Appellee (141-145, 84).

The total inventory, inside and outside the building was approximately \$28,080.00 on June 1, 1956, as reflected in a financial statement, dated June 14, 1956, to the Bank (571); no substantial delivery was received or put on the building during June, 1956 (505), and Appellee didn't know whether any merchandise was bought after said financial statement was given (200); and the total inventory at the time of the fire was not \$63,549.50 as claimed in the Proof of Loss (Ex. "K").

Appellee had no recollection of any molding or fence board being brought into the west half of the building during the month of June up to the fire (170, 171). Neither 200 squares of asphaltic roofing materials valued at \$1,680.00 in said Ex. "B" nor wiring used to bind such materials were found after the fire except four squares in the SW room and two or three squares in the front window (464-465). Such squares or metal bindings do not burn out of sight (464).

Stock items listed in said Ex. "A" of the Proof of Loss totaled \$12,949.50, of which \$7,500.00 was allocated to said portable sawmill based upon an alleged trade-in credit of \$7,500.00 from Dayton Murray Truck Sales on January 1, 1956.¹⁴ On January 12,

¹⁴Over hearsay and best evidence rule objections of Appellant, Witness Dayton Murray Jr. testified to such credit (336-345) See: Specification of Error "VI".

1956, Appellee executed a written contract with Dayton Murray Truck Sales, a corporation, and Yellow Manufacturing Acceptance Corp. (a finance corporation for General Motors Company), (340) wherein Eureka Lumber Company purchased a truck and trailer from Dayton Murray Truck Sales, accepted such portable saw mill at a "trade-in" of \$4,000.00 and allowed Eureka Lumber Company a credit of \$4,000.00 (Ex. AO, 518, 521). At the time of such transaction, W. A. Threlkeld was and had been the owner of said Dayton Murray Truck Sales since September 1953 (346-347), but Threlkeld was not called as a witness. Such portable saw mill was repairable for about \$1,700.00 (510); and there was salvage in the motor block (192-194).

It was stipulated that two electric motors, valued at \$600.00 and \$700.00 at page 5 of said Ex. "A" of said Proof of Loss were from Hill & Morten Company, Inc.; the day after the fire Bert Gilbert of Hill & Morten Company Inc. was at the Eureka Lumber Co. (186); and, on August 31, 1956, Hill & Morten Company originated a claim for each of such motors with its insurer, American National Fire Insurance under policy 151093, which insured Hill & Morten Company for such loss; thereafter, Hill & Morten Company filed a Proof of Loss with American National Fire Insurance for the loss of such motors in the amount of \$1,130.00, which was paid by American National Fire Insurance by a draft payable to Hill & Morten Company and Bank of America in the amount of \$1,130.00 (575).

The set of planer heads and knives (\$590.00) listed at page 5 of said Proof of Loss inventory (Ex. "K") were on a shelf in the first floor office room on the west wall near a paint mixer, and the area was undamaged by fire (Photo Ex. "G"). Appellee did not inspect them after the fire (183-4); and he could not identify the seller (185).

Other items listed in said Exhibit "A" of the Proof of Loss showed that Appellee as wholesaler was listing a retail price and not the wholesale price; light foundation bolts were 7 to 8 cents a piece not \$.15 (467); Pabco roof coating was 74 or 75 cents a gallon—not \$1.10 (467); a vent and wall window was \$20 to \$25 not \$54.00 (467); a four foot metal kitchen cabinet was \$80 to \$90 not \$145.00 (468); a double sink was \$30.00 not \$51.00 (468); the plumbing items such as ell's and T's (\$70.77) were useable after the fire (182-3), but they were permitted to rust (469).

Policy lines 7-24 (Ex. 1) provide, in part:

"This company shall not be liable for loss by fire or other perils insured against in this policy caused * * * by: (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, * * *; (j) nor shall this company be liable for loss by theft." (26.)

(2) Appellee Had Knowledge of Time and Origin of Incendiary Fire.

In his Proof of Loss Appellee stated the fire originated about 12 noon, and he did not know the cause of the fire (Ex. K). He told Fireman McBeth, he

left the premises at 11:40 A.M. for lunch, and H. D. Jensen said he left between 5 to twelve and 5 after twelve (429). To the contrary, under cross-examination, H. D. Jensen admitted he was at the building until about 12:15 (529); Appellee admitted he was at the building until about 12:05 P.M. and returned at 12:30 P.M. (244), but he denied he knew what time the fire started (245). H. D. Jensen was observed fleeing from the direction of the building after the fire was discovered and before the alarm sounded (Musser 260-263).

Therefore, there was substantial evidence that the Proof of Loss was false as to the quantity of the stock and amount of loss, and that Appellee knew the time of the fire and its origin; and the evidence offered by Appellant as to the financial condition of Appellee and H. D. Jensen was admissible either to show motive or to connect Appellee and H. D. Jensen with said fraud, concealment, or the incendiary fire.

VII. APPELLANT'S REQUESTED INSTRUCTIONS NOS. 8, 29, 18, 19-21, RE: FRAUD AND CONCEALMENT AS TO APPELLEE'S KNOWLEDGE OF THE ORIGIN OF THE FIRE AS A DEFENSE, AND ITS BURDEN OF PROOF, BY A PREPONDERANCE OF THE EVIDENCE, ERRONEOUSLY REFUSED.

Appellant's proposed instruction No. 8 (26), which the Court failed to give was in the exact language of Sect. 2071 of the Insurance Code and the policy (26-27).

Policy lines 1-5, expressly, provided:

“Concealment, Fraud.

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.”

An insured may commit fraud by concealing or misrepresenting his knowledge concerning the origin of a fire,

Singleton v. Hartford Fire Ins. Co. (1930), 105 Cal.App. 320, 326, 287 P. 529.

In its Answer (17, 5th Defense 2(a)), Appellant raised the defense that Appellee fraudulently stated he did not know the cause or origin of the fire; whereas, in fact, he did know them. There is ample evidence that he was well aware of the incendiary origin of this fire. At the trial he admitted he told Fireman McBeth, somebody set the fire (114); it was an incendiary fire with an inflammable liquid used at the point of origin (431-432), where an unexplained 5 gallon open top diesel container was found (440), and 2 unexplained one gal. open top diesel containers and partially burned rag were found in the lumber pile (437-439); he took H. D. Jensen's son and companion away from the premises, leaving H. D. Jensen free to set the fire (113, 244, 429); from which H. D. Jensen was observed fleeing before the fire alarm sounded (258-264); and he knowingly failed to have H. D.

Jensen submit to an examination under oath (213-215).

Proposed Instruction No. 24 read:

“Burden of Proving Concealment, Fraud or Arson.

While the burden of proving concealment, misrepresentation or fraud on the part of the plaintiff to void such policy is upon the defendant, the law does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible, as concealment, misrepresentation or fraud are usually planned and executed with stealth and secrecy. In a civil action it is proper to find that defendant has succeeded in carrying its burden of proof on the issue of concealment, misrepresentation or fraud if the evidence favoring their side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that on that issue the probability of truth favors the defendant.

Concealment, misrepresentation or fraud as to the origin of a fire is provable by circumstantial evidence, that is, by inference reasonably deducible from facts proven, and this is so because the law recognizes the intrinsic difficulty of establishing such a concealment, misrepresentation or fraud by direct evidence, as a person who sets a fire to a building usually plans and executes his plan with stealth and secrecy. Consequently all of the circumstances preceding and surrounding the origin of the fire of June 25, 1956, as well as the aftermath to the fire, may be considered by

you in determining whether plaintiff has wilfully concealed, misrepresented or committed any fraud concerning this fire.” (32.)

Appellant’s proposed instruction No. 18 defined the term “concealment” in the language of section 330 of the Insurance Code of California (30); proposed Instruction No. 21 defined the term “materiality” in the language of section 334 of said Insurance Code (3d), and proposed Instruction No. 19 stated that whether the concealment is intentional or unintentional it voids the policy.

Gates v. General Casualty Co. of America (1941 9th Cir.), 120 Fed. 2d 925, 927;

Hogel & Co. v. U.S. Fidelity & Guarantee Co. (1939), 35 C.A.2d 171, 181, 94 P.2d 1046.

Appellant excepted to the failure of the Court to instruct the jury on such issues (594-597). In *People v. Kessler* (1944), 62 C.A.2d 817 at 823, 145 P.2d 656, the Court pointed out:

“Crimes which are committed by setting fire to property are usually planned and executed with stealth and secrecy.”

In the absence of said Instructions Nos. 8, 24, 18, 19 and 21, Appellant’s right to assert the defense of fraud or concealment arising out of Appellee’s false denial of knowledge of the origin of the incendiary fire, or the concealment of the requested books, invoices and records of the Company and Appellee, was not known to the jury. Therefore, it was error to fail to submit such issues to the jury.

A. Jury Specifically Requested Court for Instruction Whether Fraud of Employee Imputable to Employer.

During its deliberations, the jury asked the Court whether fraud by an employee binds his employer, but the Court refused to instruct the jury on the subject (598-600).

B. Fraud or Misrepresentation by Insured's Agent After Loss Voids the Policy.

This Court and California have recognized the well settled general rule that a principal is liable for the frauds and misrepresentations of his agent acting within the scope of his employment, and has held that the fraud of such agent voids the policy.

In *Stockton Combined Harvester and Agricultural Workers v. Glens Falls Insurance Co.* (1893), 98 Cal. 557 at 574-576, 33 P. 633, the Court held the insured was bound by the fraudulent representation and concealment of the books and inventories of the chief bookkeeper. In *Hyland v. Miller National Insurance Company* (1932 Cir. 9), 91 F.2d 735 at 743, where the insured claimed he did not know how many goods he had in his factory, he left his bookkeeping and insurance matters to his bookkeeper, and he took the words of his bookkeeper and accountants as to the amount of his goods and damage thereto, this Court held the insured was bound by the gross exaggeration of the agents and the policy was void for violation of the same fraud provisions of the policy that were quoted in Appellant's said proposed Instruction No. 8.

VIII. IT WAS ERROR TO LIMIT APPELLANT'S CROSS-EXAMINATION OF APPELLEE AS TO WHETHER APPELLEE KNOWINGLY CAUSED H. D. JENSEN NOT TO SUBMIT TO THE REQUESTED EXAMINATION UNDER OATH ON OCTOBER 12, 1956.

A. Named Insured Was Eureka Lumber Company.

The named insured under the contract of insurance was "EUREKA LUMBER COMPANY" (4, 11)—no mention was made of either Appellee or H. D. Jensen, and Appellant did not know whether either had an insurable interest in the stock.

B. Policy Provides for Examination Under Oath to Protect Against Fraud.

Section 2071 Insurance Code and the policy at lines 113-122 provided:

"The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

The purpose of such provisions is to protect an insurer by enabling the insurer to obtain all knowledge and information as to other sources and means

of knowledge in regard to the facts material to its rights; and to enable it to decide upon its obligations and to protect itself against false and fraudulent claims,

Claflin v. Commercial Ins. Co., 110 U.S. 81, 95-6, 28 L.Ed. 76, 82, 3 S.Ct. 507.

Further, like provisions have been held to include the right to examine employees of the insured,

Hart v. Mechanics & Traders Ins. Co. (1942), 46 Fed.Supp. 166, 169.

See:

Rosenfeld v. Union Ins. Society (1957 D.C. N.Y.), 157 Fed.Supp. 395—where it was the duty of insured to inform insurer of her husband's criminal record.

C. California Requires Full Compliance With the Examination Under Oath Provision.

The fact that the insured may incriminate himself is no defense to a request to an Examination Under Oath,

Hickman v. London Assur. Corp. (1920), 184 Cal. 524, 195 Pac. 45.

Even where illness prevented the attendance of the insured at a scheduled Examination under Oath, the insured was required to submit to an examination at another time,

Bergeron v. Employees Fire Ins. Co. (1931), 115 Cal.App. 672, 2 P.2d 453.

Where the insured refused to answer questions concerning when or how she acquired "out of sight" loss items, she could not recover,

Robinson v. National Automobile Ins. Co.
(1955), 132 C.A.2d 709, 712, 282 P.2d 930.

D. There Was Good Cause to Request H. D. Jensen to Submit to an Examination Under Oath.

Assuming H. D. Jensen did not have an insurable interest in the loss, but was sales manager for Appellee, Appellant was entitled to have him examined under oath for these reasons: H. D. Jensen was in charge of the business records of the business before the fire and a complete set of books was kept (221, 486), having set them up and keeping the "financial deal" for Appellee (137, 202); he bought a lot of lumber (230); was held out as a sales manager (230); he ran his personal transactions through the account of the Company (234); he made out the financial statements given to the Crocker-Anglo Bank (Ex. 17 and 18, 195-200); after the fire H. D. Jensen operated the business under the name of Eureka Lumber Company (235); he gathered the information for the Proof of Loss and checked over the Proof of Loss for Appellee's signature (135, 333-334, 525, 270). H. D. Jensen was the last person left in the building after Ellen Van Harpen left at 12:05 P.M. (495); shortly after the fire was discovered and before the fire alarm sounded at 12:21 P.M. he was seen fleeing from the direction of the building (262-264); the fire originated in the SW room (431-437; 445-448), where he had been alone the morning of the fire (495), and he had

access to the room after Van Harpen left at 12:05 P.M.; the Proof of Loss executed by Appellee and prepared and checked by H. D. Jensen on behalf of Eureka Lumber Company on August 22, 1956, stated Appellee had no knowledge of the origin of the fire (Ex. K).

With such background, on September 26, 1956, Appellant requested the Company to exhibit to Russell M. Stearns, C.P.A., at the City of Eureka, its books of account, bills, invoices and other vouchers for examination (Ex. AU); and October 3 to 5, 1956, Stearns examined such records (545, 547). Stearns was not shown:

- (i) General ledger for calendar years 1954, 1955 and 1956;
- (ii) Accounts receivable ledger;
- (iii) Sales journal;
- (iv) All vendor's invoices and statements for 1956;
- (v) All sales invoices for 1956;
- (vi) Part of payroll records for June, 1956 (547-548, 550).

At his examination, Appellee testified he didn't know how much merchandise Eureka Lumber Company had at the time of the fire (224) and he didn't know what records were destroyed by or found after the fire by H. D. Jensen (238, 223).

Under such circumstances, Appellant was entitled to inquire of H. D. Jensen as to his knowledge con-

cerning the books and invoices after the fire; the quantity, value of and loss to the inventory, particularly, the burned "out of sight" part; his insurable interest in the stock; his knowledge concerning the time and origin of the fire, including the open 5 gal. container at the point of origin, the 2 one gallon containers in the lumber pile, and his flight from the scene. Each of such questions was material to an inquiry by Appellant to determine whether this was an honest fire with a bona fide loss, entitling it to pay the loss to the limits of its coverage.

E. The Examination Under Oath Was Properly Scheduled.

By written notice, the Examination Under Oath was scheduled to be made in the office of Appellee's attorney in the presence of Appellee in the City of Eureka (Ex. H). No objection was ever made to the time or place for the examination.

F. Appellee's Counsel and H. D. Jensen Received Actual Notice.

The examination notice dated October 8, 1956, was addressed to Eureka Lumber Company, Appellee and H. D. Jensen in care of Appellee's attorney Frederick Hilger (208, Ex. H). Prior to the scheduled examination, Mr. Hilger discussed its contents with Appellee (208); and gave H. D. Jensen actual notice of said request for said Examination Under Oath (217).

(1) Notice to Appellee's Counsel and His Sales Manager H. D. Jensen Was Imputable to Appellee.

Notice or knowledge possessed by an agent is imputable to the principal, and this rule applies to an attorney and his client,

Chapman College v. Wagener (1955), 45 C.2d 796, 802, 291 P.2d 445;

Mabb v. Stewart (1905), 147 Cal. 413, 421, 81 P. 1073.

Prior to the notice of October 8, 1956, Mr. Hilger was Appellee's Attorney and arranged for said Russell M. Stearns to examine records of the Company and Appellee after Appellant's request of September 26, 1956, that the records be exhibited to Mr. Stearns (Ex. AU, 545-547). Appellee has claimed at all times that H. D. Jensen was his agent and sales manager to and including the scheduled Examination Under Oath (230, and offer of Proof 214).

Therefore, Appellee knew prior to the scheduled examination of H. D. Jensen that the latter was requested by Appellant to appear for such examination.

G. H. D. Jensen Failed to Appear for Examination.

Appellee admitted that H. D. Jensen did not appear for the scheduled Examination Under Oath (210, 217). Although Appellee had actual knowledge of H. D. Jensen's non-appearance, he did not have him appear or offer to have him appear for an examination under oath at any time before this suit was filed on December 5, 1956 (210).

H. Defense Raised in Answer and Shown by Evidence.

In its Answer, Appellant alleged that pursuant to said conspiracy, H. D. Jensen refused to appear for an examination under oath (19, Sixth Defense Par. 2 (d)). Accordingly, at the trial as evidence of such conspiracy, Appellant proved there was good cause to examine H. D. Jensen, the giving and receipt of the written notice for the examination, and the failure to appear. Also, Appellant proved the circumstances that Appellee and H. D. Jensen were living under the same roof; Appellee had H. D. Jensen take the records and inventory after the fire and gather the information for and check the Proof of Loss; and Appellee's counsel had the original notice for Appellee and H. D. Jensen to appear for an Examination Under Oath and produce the records at the office of Appellee's counsel.

By cross-examination of Appellee, Appellant sought to prove that knowing of the scheduled examination Appellee sent H. D. Jensen out of the City of Eureka the morning of the scheduled examination, but the trial Court sustained an objection to questions addressed to such facts (211). Whereupon Appellant offered to prove such facts by reading the record of the Examination Under Oath of Appellee, wherein Appellee admitted that he told H. D. Jensen that he was going to appear for the examination; and, he sent H. D. Jensen out of Eureka to buy lumber anywhere he could buy some (213-215). Certainly, such evidence would support a finding that Appellee's testimony that he did not know H. D. Jensen had been requested

to appear at the Examination Under Oath was “inherently improbable”; further, that pursuant to the conspiracy H. D. Jensen did not submit to an examination.

IX. ERROR TO REFUSE TO STRIKE OR PERMIT CROSS-EXAMINATION OF APPELLEE ON HIS VOLUNTARY STATEMENT “THAT IS A LIE”.

In response to a question addressed to counsel by the Court as to what difference it made as to whether Appellee saw H. D. Jensen the morning scheduled for said examination of H. D. Jensen, Appellant’s counsel replied:

“Mr. Castro. There are cases that hold, your Honor, that you are entitled to examine the employee under oath on these losses.

The Court. What has that got to do with the examination of this witness? If you want to make a point of it all you have to do is to show you requested the examination but he did not appear. I do not see how that is material in the examination of this witness.

I want to show this witness (Appellee) sent him out of town that morning” (parenthesis added)

whereupon, Appellee stated:

“That is a lie.” (211.)

Appellant immediately moved to strike the statement by Appellee as not responsive to any question. The Court denied the motion. Appellant asked the Court to allow counsel the right to cross-examine Appellee as to the voluntary statement. The Court denied the

right of cross-examination. Thereupon, Appellant moved to strike the statement upon the further ground Appellant had been deprived of the right of cross-examination. The Court denied that motion (212); and the Court sustained the following objections to questions which followed as to whether Appellee sent H. D. Jensen out of Eureka (212-213):

“Q. (By Mr. Castro). On the morning of the examination under oath did you furnish Dee Jensen your car to leave the City of Eureka?

Mr. Hilger. I will object to that as totally immaterial.

The Witness. I can answer. No.

The Court. I will sustain the objection.

Q. (By Mr. Castro). On the morning of the examination under oath, did you know that Dee Jensen was requested to appear for that examination under Oath?

Mr. Hilger. I object to that as immaterial.

The Court. Sustained.

Q. (By Mr. Castro). On the morning of the examination under oath you sent Dee Jensen out of the City of Eureka, didn't you?

Mr. Hilger. I will object to that and cite it as misconduct of counsel, in addition to being immaterial.

The Court. I will sustain the objection, and if counsel persists in this examination I will take further measures. You have already asked that question and he answered it in quite emphatic terms, and I do not think there is need to repeat it.”

Whereupon, Appellant made its offer of proof, that Appellee, in fact sent H. D. Jensen out of Eureka,

which offer was rejected (213-221). The circumstances surrounding H. D. Jensen's failure to appear for the scheduled examination were admissible as bearing on the defense of fraud and concealment, conspiracy, the incendiary origin of the fire and whether Appellee breached the policy. The Jury could well have found from the offered evidence that Appellee knowingly told H. D. Jensen not to appear for the examination, and that such conduct was pursuant to a conspiracy to defraud Appellant. Therefore, it was error to refuse to permit Appellant to examine Appellee as to whether he saw H. D. Jensen on the morning of the scheduled examination; what was said between them; what Appellee had him do.

The error was compounded by the Court's refusal to strike Appellee's voluntary statement or permit him to be examined on such statement.

The consequence of the Court's ruling was that Appellee's statement "That's a lie" with reference to sending H. D. Jensen out of town was permitted to stand and Appellant was denied the opportunity to cross-examine Appellee on the point.



X. APPELLANT REQUESTED INSTRUCTION TO JURY ON RIGHT TO EXAMINATION UNDER OATH—NO INSTRUCTION GIVEN.

As stated in *Hart v. Mechanics & Traders Insurance Co.* (1942 Dist. Ct. W.D. La.), 46 Fed.Sup. 166 at 169, an insurance company is entitled to examine the agents of the insured to determine its obligation and to protect itself against false claims:

“The purpose of such a provision in an insurance policy is to protect the insurer against fraud, by permitting it to probe into the circumstances of the loss, including an examination of the insured, or his agents. By such course, it is better able to determine its obligations and to protect itself against false claims. *Claffin v. Commonwealth Fire Insurance Company*, 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed. 75.” (p. 169.)

In its proposed instruction No. 3 (24) Appellant requested the Court to call to the Jury’s attention the examination under oath provision of the policy, and that a failure to comply therewith constitutes a defense.

In its proposed instruction No. 5 (26) Appellant requested the Court to instruct the Jury that the word “shall” used in the policy is mandatory.

In its proposed instruction No. 4 (25-26) Appellant requested the Court to inform the Jury that the burden of proof was upon Appellee to prove that he performed the conditions of the policy. After the Court omitted to instruct on such subjects, the Appellant excepted to the omission (596).

The failure to comply with said examination under oath provisions has been held to constitute a complete defense to a claim by the insured. Also, it was one of the overt acts of the conspiracy with Appellee (19, 6th Defense (d).) There was substantial evidence that H. D. Jensen was an agent for Appellee, being the Sales Manager of the Company’s business (230), in charge of its books and finance, purchasing its lumber in his name and putting the Company money

through his bank account (230, 233), running his personal business through the Company (234), arranging for this insurance (61), taking charge of the record and inventory after the fire (237-238), preparing and checking the proof of loss (135, 270, 525-6).

Therefore, Appellant was entitled to have the Jury know that a failure of H. D. Jensen to submit to said examination under oath would constitute a defense to Appellee's claim.

XI. REFUSAL TO ADMIT IN EVIDENCE WRITTEN AGREEMENT EXECUTED BETWEEN APPELLEE, H. D. JENSEN AND OTHERS FOR EUREKA LUMBER COMPANY, AN ERROR.

In its answer, Appellant alleged in its Seventh Defense that H. D. Jensen was a real party in interest (19); and in its Fifth Defense, Par. 2 (f) (18) that said H. D. Jensen had an interest in the loss which Appellee concealed (18).

During the trial Appellant stated to the Court that the issue of H. D. Jensen's said interest was before the Court (68-9). Under the express terms of the insuring agreement of the policy the liability of Appellant did not exceed:

“nor in any event for more than the interest of the insured . . .”

By statute the policy is required to specify:

1. The interest of the insured in property insured if he is not the absolute owner thereof, Ins. C. 381 (c). The named insured under the policy was Eureka Lumber Company. By statute, if the insured has no insurable interest at the time the policy takes effect

and when the loss occurs, the contract is void, Ins. C. Sects. 280, 286. If Eureka Lumber Company had no insurable interest in the stock the policy would be void.

In the proof of loss that he executed on behalf of the Company, Appellee stated that the Company was the sole owner of the stock and no one else had any interest in it (Ex K-Par. 3). Therefore, the interest of H. D. Jensen in the stock was material in that:

(1) Such interest could void the policy;

(2) It would be a ground, independent of any employment or relationship agreement, entitling Appellant to examine H. D. Jensen under oath; and

(3) It would be evidence of fraud, concealment and conspiracy, particularly in view of Appellee's claim of no interest in H. D. Jensen.

As a part of the evidence on the issue of the interest of H. D. Jensen, in cross-examination of Appellee, Appellant developed the fact that a transaction had occurred wherein the Eureka Lumber Company was purportedly transferred to which transaction H. D. Jensen was a party (227-229). As a part of the proof of such transaction, Appellant offered in evidence a written agreement purportedly covering this transaction, which document the Court rejected (Ex. J. Identif. 229).¹⁵ This ruling was error.

¹⁵The Alert Lumber Co. mentioned in Ex. J was identified by H. D. Jensen as: "A. Alert Lumber Company. They were going under the Eureka Lumber Company; that's a subsidiary of the Alert." (284)

The document formed a link in the evidence indicating an interest of H. D. Jensen. This chain of evidence starts with the fact that H. D. Jensen and Appellee were active in the operation of a saw mill on the Hanson Road (78, 225-226). In this operation, H. D. Jensen got into serious financial difficulties. Appellee and H. D. Jensen handled the problem by having H. D. Jensen's interest in said saw mill operation transferred as a part of said transaction, whereby the Eureka Lumber Company (the named insured in this policy) was nominally placed in the name of Appellee (Ex. J, Identif. 229). Appellee owed H. D. Jensen money (232). H. D. Jensen ran his personal business through the Company (234). H. D. Jensen voluntarily petitioned the Court to be adjudicated bankrupt. Following such adjudication in bankruptcy and before this fire H. D. Jensen opened a bank account in his name (232-233, Witness A. J. Franceschi) and funds of the Eureka Lumber Company were then deposited in his account, and the account was used in connection with the business (558-560). H. D. Jensen arranged for the fire insurance (61). The evidence concludes with the fact that immediately following the fire, H. D. Jensen operated under the name of the Company (235), had possession of the books of account and records of the Company (237-8), and said truck and trailer purchased by the Company from Dayton Murray Truck Sales was transferred without any consideration to H. D. Jensen (Ex. AP Identif., 523, Witness Richard Hanna). In view of the part that said Ex. J played in this picture, to exclude it was clearly erroneous.

XII. THE COURT ERRED WHEN IT INSTRUCTED THE JURY THAT THE BURDEN OF PROOF WAS UPON APPELLANT TO PROVE APPELLEE "WILFULLY REFUSED" TO PRODUCE REQUESTED RECORDS.

The Court instructed the jury:

"The defendant claims that the plaintiff has not complied with the policy of insurance by not producing all of the records which the defendant demanded, and thereby has debarred himself from recovery in this action. Whether or not the plaintiff has so complied with the policy is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence. If you find that plaintiff substantially and *wilfully failed to produce material records* within his power to produce, then you may find for the defendant; otherwise not. Stated somewhat differently and on the other side, as it were, you should not find in favor of the defendant on this issue unless you are convinced by a preponderance of evidence that the plaintiff *willfully failed to produce records* which were material to his claim of loss and within his power to produce. The defendant has the burden of proving such failure on the part of the plaintiff. I mean by that the defendant has the burden of proving that the plaintiff has substantially and *willfully failed to produce records* within his power to produce." (Emphasis supplied.) (589-590.)

A. Burden of Proof Was Upon Appellee to Prove He Complied With Request to Produce Books and Invoices—Not Appellant to Prove Non-Compliance.

The express provision of policy lines 113 to 122, California fire insurance policy (Ex. 1) and Section 2071 Insurance Code provide: The Insured, "as often

as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made."

California has held that after a loss has occurred it is the duty of the insured to comply with this reasonable provision of his contract, and the performance of such duty is a condition precedent to any right of action.

In *Hickman v. London Assurance Corp.* (1920), 184 Cal. 524 at 532, 195 Pac. 45, the Court reversed a judgment for the insured and ordered the trial Court to enter judgment for the insurer, stating:

"The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent 'as often as required', and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the

conditions of which he has failed to perform. In other words, when he commenced this suit he was without a cause of action.

It has been said that 'Mere hardship or difficulty will not excuse a party from carrying out a contract; and, where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without his fault, making it difficult, or even impossible, for him to perform.

It follows that the conclusion of law that respondent's refusal to submit to examination and produce his books and papers on the ground of his constitutional immunity was 'justified . . . proper and right' is erroneous, and that upon the findings of fact as to his refusal judgment should have gone for the appellants."

Pursuant to the insurance contract, policy lines 113 to 122, Appellant made three requests:

(1) By letter dated September 26, 1956, to its named insured Eureka Lumber Company (Ex. AU, 545-547), Appellant set forth said policy and statutory provisions and asked Eureka Lumber Company to "produce all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost relating to the items listed in Exhibits A, B and C attached to the Proof of Loss filed to Policy No. 560594 relating to building materials and other personal property", and designated C.P.A. Russell Stearns to examine them in Eureka (547). On October 3, 4 and 5, 1956, at Eureka, Stearns examined records of the Company at its office, but they did not include:

- (i) general ledger for calendar years 1954, 1955 and 1956;
- (ii) accounts receivable ledger;
- (iii) sales journal;
- (iv) all vendor's invoices and statements for 1956;
- (v) all sales invoices for 1956;
- (vi) part of payroll records for June, 1956 (547-548, 550).

At that time and place, H. D. Jensen stated he had some records at home, and he was asked to bring them to the office of Appellee's Counsel. Such records were not shown to Stearns (545-548) before his departure from Eureka on October 5.

(2) By letter dated October 8, 1956 (Ex. "H"), Appellant requested Appellee and H. D. Jensen to submit to an Examination Under Oath by Augustus Castro at the City of Eureka (205) and to exhibit its books of account, bills, invoices and other vouchers for examination. At that time, H. D. Jensen lived at Appellee's home in Eureka (232) and he was personally notified of the time and place for his Examination Under Oath (217), but did not appear or submit to such an examination at that time or before this action was filed¹⁶ (210).

At the Examination Under Oath of Appellee, Appellant called to Appellee and his counsel's attention,

¹⁶On May 11, 1957, Appellant took H. D. Jensen's deposition in this action (281-282).

that certain records and invoices had not been shown to Stearns; thereupon, it was agreed by Appellee and his counsel that if Appellant would specify the records, Appellee would exhibit them to Stearns (209-210). Thereafter, Stearns made a written report as to the documents not found by or shown to him (547).

(3) On October 19, 1956, by letter addressed to Eureka Lumber Company, Appellee and H. D. Jensen (Ex. AV, 547), Appellant listed the records not shown to Stearns as:

“(a) General ledger for the calendar years 1954, 1955 and 1956;

(b) Accounts receivable ledger;

(c) Combination Cash and Sales Journal;

(d) All vendors invoices and statements for 1956;

(e) All sales invoices for 1956;

(f) All correspondence for 1956;

(g) All payroll records including the entire month of June, 1956;

(h) All cancelled checks of the Eureka Lumber Company for 1956;

(i) All bank statements together with cancelled checks of Harold D. Jensen for 1955 and 1956.”

“As soon as the records are available notify us because the insurance companies have requested Russell M. Stearns to examine such records at Eureka, California, as soon as you make them available.

Therefore, let me know when such unproduced records will be made available.”

The Company kept a complete set of books of account (221) consisting of general ledger, general journal, sales journal, accounts receivable ledger, and receipts and cash disbursements journal (486). Such books of account were kept on an open shelf under the counter in the 1st floor office, and the books were posted through May, 1956. Likewise, all invoices, reflecting sales and purchases, were kept in a folder until paid, then they were placed in a steel file next to Ellen Van Harpen's desk in the office. On the morning of the fire, the books and invoices were in her office, except the accounts receivable book which was upstairs. There was no fire or burning of the counter, shelf, desk or file in the fire. After the fire was extinguished, H. D. Jensen took the accounts receivable book from the building, showed it to Mrs. Van Harpen and took it to his pickup. While the ledger of the accounts receivable book was damaged the pages were intact and legible. Several days after the fire Mrs. Van Harpen saw the other books of account undisturbed on the shelf where she had left them the day of the fire, and the invoices had not been disturbed (Photo Ex. "G", 485-492). After the fire, H. D. Jensen admitted he had some records at home, which he was requested to exhibit to Mr. Stearns but did not do (546); further, he removed the accounts receivable book after the fire, made a reconstruction of it and gave it to Mr. Hilger (572-5).

A standard method used by Certified Public Accountants to establish an inventory at a given time is to take a beginning inventory, add to it the sub-

sequent quantity and dollar value of the purchases, then deduct the quantity and dollar value of the sales, and the balance reflects the quantities and value left at the end of the period (548). Although Appellee's 1955 U. S. Tax Return reflected the inventory as of December 31, 1955, was \$15,478.11 (Ex. I, 570-1), and Appellee's said financial statement June 14, 1956, reflected the inventory as of June 1, 1956, was \$28,080.00 (Ex. AY, 571), accountant Stearns was unable to determine from either the tax return or the financial statement how much of the inventory in December or June was hardware, redwood molding or other merchandise in the building or the outside yard (570-2).

Suit was filed on December 5, 1956, without the listed records being exhibited. On January 22 and 23, 1957, Stearns went to Eureka to examine the records he had not been shown. However, he was not shown the requested records listed as "a" to "i" in the October 19, 1956, request, but was shown the same records he saw on his earlier trip in September, 1956, except for a single sheet of paper with names, some addresses and some amounts with some notations of "Paid" (Ex. AW, 549-550).

There was no evidence to show any of said records listed as "a" to "i" were exhibited to Appellant as required by the express provisions of the policy.

- B. The Court Erred in Refusing to Instruct the Jury That the Burden of Proof Was Upon Appellee to Show That He Had Fulfilled the Requirements of the Policy.**

Appellant's proposed instruction No. 3 read (24-25):

“Compliance with Conditions Precedent Required.

The standard California fire insurance policy provides that:

‘No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy will have been complied with, . . .’

In its answer, defendant has set forth that plaintiff did not comply with the following requirements of the standard California fire insurance policy in that such policy provides as follows:

‘The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribed the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.’

When an insured has failed to comply with the requirements of the policy which require him to produce said bills, invoices and other vouchers, or copies thereof if the originals be lost or fail to submit to an examination under oath, the

failure either to produce such documents or submit to such Examination Under Oath constitutes a complete defense to any action on the policy.

Hickman v. London Assurance Co. (1920) 184 Cal. 524; 195 P. 45—failure to submit to examination under oath; *Baldwin v. Bankers & Shippers Ins. Co.* (1955 Cir. 9th) 222 Fed. 2d 953. *Seivel v. Lebanon Mutual Ins. Co.* (1900) 46 Atl. 851—failure to produce books and documents. *Robinson v. National Automobile Ins. Co.* (1955) 132 C.A. 2d 909, 912; 282 P. 2d 930—failure to answer questions in out of sight loss.”

Appellant’s proposed Instruction No. 4 read (25-26):

“Burden of Proof

An insurer is not liable except upon proof that the loss has occurred with the terms of the policy and the burden of proof is upon the insured to prove that he has performed the conditions of the policy.

Rizzutto v. National Reserve Ins. Co. (1949) 92 C.A. 2d 143; 206 P. 2d 431, 432.”

Certainly, as pointed out in *Hickman v. London Assurance Company* (1920), 184 Cal. 524 at 532, 195 Pac. 45, the obligation was upon Appellee to prove that he had submitted the requested records or copies, if the originals were lost—not upon Appellant to prove the failure to produce was wilful.

Therefore, it was error to instruct the Jury that the burden was upon Appellant to prove that Appellee “wilfully” failed to produce said records, and to

refuse to instruct that the burden was upon Appellee to prove he had produced the records.

XIII. APPELLANT WAS ENTITLED TO CROSS-EXAMINE APPELLEE AS TO HIS KNOWLEDGE OF EUREKA LUMBER COMPANY'S STOCK INVENTORY AS OF THE CLOSE OF ITS BUSINESS YEAR ON DECEMBER 31, 1955.

Because of the claimed "out of sight" loss and the absence of invoices to support such loss, Appellant sought to establish a normal, and recognized, starting point for the inventory; then, determine purchases and sales thereafter. In the financial statement dated June 14, 1956, to Crocker-Anglo Bank (Ex. 18), Appellee stated that as of December 31, 1955, the Company's closing inventory for the calendar year 1955 was \$15,478.11. So, Appellant asked Appellee if he knew of any other inventory as of December 31, 1955 (202-203):

"Q. To your knowledge was there any additional inventory at the time referred to?

Mr. Hilger. To what date are we now referring?

Mr. Castro. Referring to Exhibit 18, which was the proof of loss on June 1, 1956, containing a statement fixing an inventory of \$15,478.11.

Mr. Hilger. I doubt if any proof of loss was filed on the date given, counsel.

Mr. Castro. I am not talking about proof of loss.

Mr. Hilger. You stated proof of loss. You may not have meant it.

Mr. Castro. Profit and loss statement.

Mr. Hilger. I am going to object to that as being too remote from the date of June 5, 1956, as to what might or might not have been in there. We have gone back to December 31, 1955, which is six and a half months prior to the fire, and what inventory was there on that date has absolutely no connection.

The Court. Is that what you are reading from, a profit and loss statement for 1955?

Mr. Castro. June 1, 1956, to which is attached a profit and loss statement dated December 31, 1955.

The Court. Then it is a profit and loss statement for 1955 that you are referring to.

Mr. Castro. No, I am referring to a profit and loss statement which is Exhibit 18, which was under date of June 1, 1956, and attached to it on the inside is a profit and loss statement reflecting the inventory as of the close of business in 1955.

Mr. Hilger. And the specific question has to do with the inventory of December 31, 1955, which I submit is too remote in time to have anything to do with the existence or non-existence of an inventory on June 25, 1956.

The Court. I think the objection is good."

If there was no other inventory at the close of business on December 31, 1955, it would have given a recognized starting point for determining the inventory at the time of the fire. The record of purchases and sales between December 31, 1955, and June 1, 1956, could have been used to verify that the inventory at the close of business on June 1, 1956,—25 days before the fire—was only \$28,080, as reflected in the same financial statement (Ex. 18, AY, 571), consisting of

“Merchandise—Finished \$18,280.60” and “Merchandise in Process \$9,799.40”. Appellee did not know of any merchandise bought between June 1, and 25, 1956 (200). Therefore, the gross exaggeration of an inventory of \$63,599.54, and a loss of \$33,549.54, including the “out of sight” portion of \$20,500.00 (Ex. K), would have been demonstrated by Appellee’s own testimony.

XIV. TESTIMONY OF APPELLEE THAT AFTER THE FIRE MR. MOSER TOLD HIM THAT TWO TRUCK DRIVERS HAD SEEN TWO MEN, AND APPELLEE TOLD POLICE AND FIREMAN ABOUT THE TWO MEN WAS HEARSAY AND INADMISSIBLE.

In direct examination, Appellee, over the hearsay objection of Appellant, testified that he told fireman McBeth that he thought somebody set the fire, and Mr. Moser told Appellant that 2 truck drivers had told Moser they had seen 2 men at the fire, which conversation Appellee reported to the policemen and fireman (114-116):

“Q. (By Mr. Hilger). After the fire was put out, did you do anything else in connection with it during the existence of the fire, that is, yourself personally?

A. Yes, we went in and looked things over.

Q. When was this? During the fire?

A. Right after the fire.

Q. You mean after it was put out?

A. Yes. Mr. McBeth, one of the firemen, was there and he asked me how I thought it caught fire, and I told him I didn’t know. I said, ‘I think somebody set it afire.’ I said, ‘We had

better get an investigator'. I told him and the fire chief. In the meantime we walked outside. Mr. Moser—he is a truck dispatcher that is on the opposite corner—two fellows, truck drivers, told him that they had seen two men——

Mr. Castro. Just a moment.” (114)

“The Court. This will be hearsay, I’m afraid, counsel.

Mr. Hilger. I’m afraid that would be, your Honor. I want to establish this fact.

Q. Did you receive information concerning anyone being seen around the place?

A. Yes, I did.

Mr. Castro. I object to that as hearsay.

Mr. Hilger. I just want to find out if he received the information.

Mr. Castro. I object to that as hearsay. What information he may or may not have received in the absence of the defendant, Your Honor, I believe is hearsay.

The Court. As long as he does not say what it was, he may use that fact as a preliminary to something that he did. I can’t tell.

Mr. Hilger. Precisely, your Honor.

The Court. The witness is not to testify to what he heard, but he did receive some information and that much I will allow.

Q. (By Mr. Hilger). You received some information concerning someone seen at the fire, and thereupon what did you do?

A. Yes, I did.

Mr. Castro. Just a moment, Your Honor, I object to that as calling for hearsay.

The Court. I will rule on it after I hear his answer to the next question.

Q. (By Mr. Hilger). What did you do with the information so received?

A. I called Mr. McBeth, the fireman, and the (115) chief of the firemen, and a couple of police officers and told them.

The Court. All right. You gave the information that you received to some police officers.

The Witness. Yes, I did, and the fireman, Mr. McBeth, and I told him——

The Court. You can't say what you told them.

Mr. Hilger. Without saying what you said——

The Witness. I will keep still.

Mr. Hilger. You passed on the information you received.

The Witness. Okay.

The Court. I will allow the answer to stand for the purpose stated. The witness received some information and passed it on to the police officers." (116)

Each of the conversations was outside the presence of Appellant: the statement by the 2 truck drivers to Moser; the statement by Moser to Appellee; and Appellee to McBeth. They were prejudicial since they would lead the jury to believe that 2 unidentified men set the fire—not H. D. Jensen.

See:

Estate of Dolbeer (1906), 149 Cal. 227, 247, 86 P. 695.

XV. TESTIMONY OF DAYTON MURRAY, JR., THAT EUREKA LUMBER COMPANY WAS ALLOWED A "TRADE IN" CREDIT OF \$7,500.00 FOR THE SAW MILL ON THE PURCHASE OF A TRUCK AND TRAILER WAS HEARSAY AND INADMISSIBLE.

In said Exhibit "A" of the Proof of Loss (Ex. K), Appellee itemized each item that was "VALUELESS BUT INTACT FOR COUNTING". Such items totaled \$13,045.54, of which \$7,500.00 was allocated to a portable saw mill listed at page 5 of said exhibit, or 57% of the alleged visual loss.

In his deposition, on direct examination by Appellee, on September 7, 1957, Dayton Murray, Jr., after identifying himself as the present secretary of Dayton Murray Truck Sales, stated he had in his possession a bill of sale and an invoice each dated January 1, 1956 (Ex. 20) pertaining to the said saw mill (335-336). Cross-examination showed that the witness was neither an employee nor officer of Dayton Murray Truck Sales from September, 1953 to February or March, 1956—the witness and his father sold Dayton Murray Truck Sales to W. A. Threlkeld in 1950, and neither was an employee while Threlkeld owned the company (346-358); the invoice was not an original (341), and the witness received the Bill of Sale and carbon invoice in February or March, 1956, from his father (346). There was no showing of the circumstances under which Dayton Murray, Sr. obtained said carbon invoice.

In said direct examination, Dayton Murray, Jr. testified he had no direct knowledge of the trade-in

transaction, but his knowledge was based on discussions with H. D. Jensen and Threlkeld (336). Thereafter, Appellee asked Dayton Murray, Jr.:

“Now, first what was the transaction, Mr. Murray?”

When Appellant objected on the grounds that the witness had no personal knowledge, only hearsay information (336), Appellee rephrased the question, and Appellant repeated its hearsay objection (337):

“Mr. Hilger. As a result of the discussions that you have had in the course of the conduct of business of Dayton Murray Truck Sales, state your knowledge of this situation.

Mr. Castro. Object to it as incompetent, irrelevant and immaterial, calling for hearsay. The witness has testified he has no personal knowledge of the transaction.

Mr. Hilger. Please answer the question.

The Witness. From the examination of the records of the Dayton Murray Truck Sales——

Mr. Castro. (Int'g) The question didn't call for an examination of the records of Dayton Murray Truck Sales, it called for your knowledge based upon your discussions had in the course and conduct of business of Dayton Murray Truck Sales.

The Witness. My knowledge based on my discussions of the——

Mr. Castro. (Int'g) Same objection to it, same objection that has been previously made, hearsay and the witness has stated he has no personal knowledge of the transaction.

The Witness. May I answer the question, Counsel?

Mr. Hilger. Yes." (337).

The trial court overruled the objection. Thereupon, the witness testified that from his discussions with H. D. Jensen, Threlkeld and the documents, on January 1, 1956, Threlkeld sold a diesel truck to Eureka Lumber Company and agreed to take the portable saw mill as a trade and allow a credit of \$4,000.00 and to allow an additional \$3,500.00 credit upon the resale of the saw mill within six months or a certain date (337-338).

The questions are subject to the same objection that they permit the witness to testify upon hearsay information, namely, from his discussions with third persons.

See:

Estate of Dolbeer (1906) 149 Cal. 227, 247, 86 P. 695—where in sustaining an objection to a similar question the Court stated:

"There can be no difference in principle between this question and one which calls for the opinion of the witness based upon what he may have heard. And it has been repeatedly held that to allow a witness to testify upon knowledge or information thus received is error. (*People v. Wreden*, 59 Cal. 392; *Xenia Bank v. Stewart*, 114 U.S. 224, (5 Sup. Ct. 845); *Flanagan v. State*, 106 Ga. 109, (32 S.E. 80); *Kehrig v. Peters*, 41 Mich. 475, (2 N.W. 801).)"

Clearly, such testimony was hearsay and prejudicial. The discussions between H. D. Jensen and Threlkeld

and the discussions between Murray and H. D. Jensen and Threlkeld were not in the presence of or with the knowledge of Appellant, or its representatives.

See:

Coulter Dry Goods Co. v. Munford (1918) 38 C.A. 231, 234, 175 P. 900—where conversations between plaintiff's general manager and its credit man about the financial condition of defendants were inadmissible as hearsay.

A. Testimony of Dayton Murray, Jr., as to the Meaning of the Figures \$4,000.00 and \$3,500.00 on a Carbon Invoice Was Hearsay and Not the Best Evidence.

In his deposition on direct examination, Dayton Murray, Jr. was asked by Appellee as to what the figure of "\$4,000.00" represented in said carbon invoice. Over Appellant's objection that the original document¹⁷ was the best evidence and Murray had no personal knowledge of the transaction, Murray testified it reflected \$4,000.00 credit for the mill (340-341).

In his deposition on direct examination, Appellee asked Dayton Murray, Jr. whether the figure of \$3,500.00 in said carbon invoice represented a credit in addition to said \$4,000.00. Over Appellant's objection, that it was incompetent, irrelevant and immaterial, the \$3,500.00 notation was not shown to be a part of the original invoice or who made the notation, the witness had no personal knowledge of the transaction, and that the question called for the opin-

¹⁷No showing was made that the original invoice was lost or destroyed, or if this carbon was a true and correct copy.

ion of the witness, Murray testified it was an additional credit of \$3,500.00 (342-343).

The best evidence rule applies to proving the contents of any writing.

See:

Lawrence v. Premier Ind. Assur. Co. (1919), 180 Cal. 688, 697, 182 P. 431;

Milwaukee Alaf Co. v. Wetzel (1928), 93 C.A. 775, 790-791, 270 P. 382—where the Court sustained an objection to the question whether the words “iron frames and sash” were not on the plans from which defendant made up his bid on the grounds the plans were the best evidence.

Further, the witness’ answer was based on the hearsay discussion that he stated he had with H. D. Jensen and Mr. Threlkeld outside the presence of Appellant (336).

B. Admission of the Carbon Invoice Violated Best Evidence and Hearsay Rule.

At the conclusion of reading the direct examination of the deposition of Dayton Murray, Jr., Appellee offered in evidence said carbon invoice. Over Appellant’s objection that it was not the best evidence of the transaction the Court had the carbon invoice, and the Bill of Sale, marked as exhibit 20 (344-345).

A visual examination of such invoice shows that it is carbon and that the notation:

“additional credit of \$3,500.00 through June 12, 1956, to be paid to YMAC on this account”

was not part of the original invoice. There was no evidence to show who or when the quoted addition was placed on the carbon of the invoice. Nor was there any evidence to show that the original invoice was lost or destroyed. Also, while it called for the \$3500.00 credit to be paid to YMAC, YMAC was never advised of or received such \$3500.00 (519). On January 12, 1956, Appellee and Threlkeld, personally, executed a written Conditional Sales Contract with Yellow Motors Acceptance Corporation (Finance Company for General Motors) for said truck, wherein the "trade-in" credit for the sawmill was \$4,000.00 only (518-519; Ex. "AO").

Before secondary evidence can be used to establish the contents of a writing, it must be shown that:

(a) an original existed,

Reynolds v. Lincoln (1886), 71 Cal. 183,
194, 9 P. 176, 12 P. 449;

(b) was duly executed,

C.C.P. 1937;

(c) has been lost or destroyed,

Sections 1937 and 1855 C.C.P.;

(d) a true copy,

Dyer v. Hudson (1884), 65 Cal. 372, 373,
4 P. 235.

Such a foundation was not laid by Appellee. Therefore, the carbon invoice was inadmissible and prejudicial because it gave written support to Appellee and the hearsay testimony of Dayton Murray, Jr.

XVI. APPELLANT'S MOTION FOR A DIRECTED VERDICT AND JUDGMENT NON OBSTANTE VEREDICTO SHOULD HAVE BEEN GRANTED.

At the close of all the evidence, Appellant made an oral motion for directed verdict (580-581); and, after the verdict, for a Judgment N.O.V. (37-38) on the grounds that the evidence was uncontradicted that Appellee had not complied with the requirements of the policy to be performed after a loss has occurred.

A. Prior to and After the Fire Eureka Lumber Company Had the Records Which Were Requested But Not Shown to Appellant.

There was a complete set of books of account including a general ledger, general journal, sales journal, accounts receivable ledger, and receipts and cash disbursements journal (221, 486). They were kept under the counter in the first floor office, and were posted through May 1956 (487). All sale and purchase invoices were kept in a folder until paid, when they were put in a steel file on the first floor office. The books and invoices were there the morning of the fire except the accounts receivable ledger, which H. D. Jensen took (487-488). While the books and invoices in the first floor office were not damaged by the fire (490-492), the accounts receivable book was damaged on the edges; but its contents were legible (490). H. D. Jensen admitted he had some books, including the accounts receivable book at home a month after the fire (546, 574, 575), which were never exhibited to Appellant's representative (545-550).

B. Likewise, Appellant Properly Requested to Examine H. D. Jensen Under Oath, But He Did Not Appear to Be Examined.

The record is uncontradicted that a proper written request was made of and received by Eureka Lumber Company, Appellee and H. D. Jensen that the latter appear for an examination under oath, but he did not appear or notify Appellant he was available (Ex. H, 208, 210, 217).

C. The Books of Account, Invoices and Examination Under Oath Were Material to a Determination by Appellant of Its Liabilities.

First, there was an alleged "out of sight loss" of at least \$20,600.00 (Ex. K).

There was no evidence that Appellee requested any seller for a copy of any invoice after the fire and before he filed this action.

By use of the books of account, the invoices and a physical inventory after the fire, Appellant could accurately determine "any" out of sight loss (548). Likewise, with said books and invoices Appellant could verify the accuracy of the inventory of \$28,080.00 set forth in the financial statement given to the Crocker-Anglo Bank 11 days before the fire (Ex. 18 or AY); or in the financial statement as of December 31, 1955, fixing the total inventory at \$15,478.11 (Ex. 17) (571).

Second, it was essential for Appellant to determine the identity and capacity of the named insured Eureka Lumber Company¹⁸ and whether H. D. Jensen had an

¹⁸No certificate of doing business under a fictitious name was filed until after the issue of examining Harold Dee Jensen and the production of books of account arose. See: Ex. 4, October 31, 1956.

insurable interest in the loss. From the records he examined, Stearns learned that moneys of the Company were being deposited in H. D. Jensen's bank account prior to the fire (559). At the trial, Appellee testified such deposits were for lumber H. D. Jensen was buying for the Company (233); but on October 12, 1956, Appellee testified H. D. Jensen was running his personal business through Eureka Lumber Company (234), and after the fire H. D. Jensen was operating under the Eureka Lumber Company name (235). Therefore, Stearns specifically requested he be shown the invoices reflecting the lumber purchases for money deposited in H. D. Jensen's account.

Through the time of the trial, no such invoices or the requested books were produced (559-560).

Third, before it could pay the claimed loss, Appellant was entitled to examine H. D. Jensen concerning the time and origin of the fire, the presence of inflammable fluids at the point of origin and in stacked lumber, his flight from the building, the "out of sight" loss in the Proof of Loss, the doing of business in the Company's name, his interest in the business, and the disappearance of the books and other records of the business under his control.

Therefore, the motions should have been granted because the evidence was uncontradicted that the requested material, books, invoices and records were in the possession of Appellee immediately before and after the fire; but neither they nor copies thereof were shown to Appellant's designated representative before

or after this action was filed; and the named insured, Appellee and H. D. Jensen were actually and properly notified of the request to examine H. D. Jensen under oath and although he was available for the examination, he did not appear; his knowledge and activities surrounding the business, the time and origin of the fire, the Proof of Loss and the records were material to any decision Appellant was to make as to its liability for this loss.

CONCLUSION.

Appellant respectfully urges that the Judgment be reversed with direction to the trial Court to enter judgment in favor of Appellant on the ground that the evidence as a matter of law demonstrated neither the named Insured Eureka Lumber Company nor Appellee complied with the requirements of the policy to produce books, invoices and the other records or to submit H. D. Jensen for examination under oath; or, the Judgment should be reversed on either of two distinct grounds: (1) that there was substantial evidence warranting the submission to the jury the issues of fraud, concealment, incendiary fire and a conspiracy to defraud by setting the fire and swearing to and filing a fraudulent Proof of Loss, relating to such defenses under the answer and the third Party Complaint, or (2) that errors of law occurred in rejecting financial evidence of motive, refusing to allow cross-examination of Appellee concerning the failure of

H. D. Jensen to appear for examination under oath, Appellee's knowledge of the inventory, admitting hearsay and secondary evidence, by instructing the jury that the burden was on Appellant to prove Appellee "wilfully" failed to produce books and records, and by failing to instruct the jury on the defenses of right to an examination under oath, fraud and concealment relating to knowledge of time and origin of the fire, production of books and records, incendiary fire and conspiracy to defraud by setting the fire or falsely swearing or filing a fraudulent Proof of Loss.

Dated, San Francisco, California,
April 1, 1958.

AUGUSTUS CASTRO,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix of Exhibits

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G	Photograph: View first floor office showing counter paint mixer	184
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J Identif.	Photostatic copy agreement August, 1953	229
K	Original proof of loss submitted to appellant ..	248
L	Photograph: View of roof of building, facing north and east	263
M Identif.	Sheet of paper referring to redwood molding purchases	332
N Identif.	Letter witness Dayton Murray, Jr. to court reporter	351
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APPENDIX OF EXHIBITS

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